IN THE SUPREME COURT

OF THE UNITED STATES

* *

1976 TERM

No. [redacted]

* *

76-1150

~~MONTANA OUTFITTERS ACTION GROUP~~, LESTER BALDWIN, ~~RICHARD CARLSON~~, ~~JEROME S. HUGHEY~~, DAVID R. LEE, and DONALD J. MORIS,

Appellants,

-vs-

FISH & GAME COMMISSION OF THE STATE OF MONTANA; WESLEY WOODGERD, Director of the Department of Fish & Game of the State of Montana; ARTHUR HAGENSTON; WILLIS B. JONES; JOSEPH J. KLABUNDE; W. LESLIE PENGELLY; and ARNOLD RIEDER, Commissioners of the Fish & Game Commission of the State of Montana,

Appellees.

* *

APPEAL FROM THE UNITED STATES DISTRICT

COURT FOR THE DISTRICT OF MONTANA

* *

STATEMENT AS TO JURISDICTION

JAMES H. GOETZ
Counsel for Appellants
522 West Main Street
P. O. Box 1322
Bozeman, Montana 59715

TABLE OF CONTENTS

CITATIONS

CASES — PAGE

STATUTES

MISCELLANEOUS

IN THE SUPREME COURT

OF THE UNITED STATES

* *

1976 TERM

No._____

* *

~~MONTANA OUTFITTERS ACTION GROUP~~, LESTER BALDWIN, ~~RICHARD CARLSON~~, ~~JEROME J. HUGEBY~~, DAVID R. LEE, and DONALD J. MORIS,

Appellants,

-vs-

FISH & GAME COMMISSION OF THE STATE OF MONTANA; WESLEY WOODGERD, Director of the Department of Fish & Game of the State of Montana; ARTHUR HAGENSTON; WILLIS A. JONES; JOSEPH J. KLABUNDE; W. LESLIE PENGELLY; and ARNOLD RIEDER, Commissioners of the Fish & Game Commission of the State of Montana,

Appellees.

* *

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

* *

STATEMENT AS TO JURISDICTION

The Appellants, pursuant to United States Supreme Court Rules 13(2) and 15, file this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final order of the Statutory District Court and should exercise such jurisdiction in this case.

OPINION BELOW

The Statutory District Court for the District of Montana issued its opinion in this case on August 11, 1976. The opinion is not yet reported and has been attached hereto as a Joint Appendix.

JURISDICTION

This action was instituted on June 23, 1975, pursuant to Title 42 U.S.C. §1983, Title 28 U.S.C. §1343; 28 U.S.C. §2281; 28 U.S.C. §§2201, 2202; and Article IV, Section 2 (Privileges and Immunities) and the Fourteenth Amendment to the United States Constitution, challenging the constitutionality of the license fee system of the State of Montana for the hunting of big game (Section 26-202.1, R.C.M., 1947). The Statutory District Court, by District Judges Russell E. Smith and William Jameson, filed its opinion on August 11, 1976, denying Plaintiffs' claims. Circuit Judge James Browning filed a dissenting opinion.

The jurisdiction of the Supreme Court to review the decree of the Statutory District Court by direct appeal is conferred by Title 28 U.S.C. §1253.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved in this case are: Article IV, Section 2, United States Constitution and the Fourteenth Amendment to the United States Constitution. The statutory provisions involved are: Section 26-202.1, Revised Codes of Montana, 1975 version and 1976 [amended] version. The text of Section 26-202.1, R.C.M., 1975 and 1976 versions, are reprinted in the Joint Appendix to this jurisdictional statement.

QUESTIONS PRESENTED

1. Whether the Montana statutory scheme relating to big game license fees which imposes substantially higher license fees on non-resident hunters and which requires that non-residents, but not residents, purchase a "combination" license for various species of game in order to hunt big game in Montana, denies to non-resident hunters their constitutional rights guaranteed them under Article IV, Section 2 (Privileges and Immunities) and the Fourteenth Amendment (Equal Protection) of the United States Constitution.

2. Whether the Montana statutory scheme relating to big game license fees which imposes substantial burdens (financial and otherwise) on non-resident hunters but not on resident hunters, which cannot be reasonably justified on any cost basis, can nevertheless survive a constitutional challenge on the basis that political support of the local citizenry for the big game management program in Montana may evaporate in the absence of discrimination against non-resident hunters.

STATEMENT OF THE CASE

This action was filed on June 23, 1975. Plaintiffs-Appellants Carlson, Huseby, Lee and Moris are Minnesota residents who regularly hunt for big game, particularly elk, in the State of Montana. Appellant Lester Baldwin is a licensed outfitter (hunting guide) in the State of Montana whose business is substantially dependant on non-resident hunters. The Montana Outfitters Action Group is an organization whose membership consists of licensed outfitters operating in Montana, business owners in Montana, Montana dude ranchers and non-residents who hunt in Montana.

Appellants challenge the constitutionality of the following two statutory schemes relating to big game hunting embodied in Section 26-202.1, R.C.M., 1947:

1. The license fee structure which grossly discriminates against the non-resident hunter.

2. The arbitrary imposition upon non-resident hunters, but not resident hunters, of the big game "combination" license for the right to hunt certain species of big game, particularly elk. In the 1975 hunting season, in order to hunt elk in Montana, the non-resident hunter was required to purchase a "combination" license ($151.00 fee) which entitled him to take one elk and two deer. The resident was not required to purchase a "combination" license, but instead could purchase a license solely for elk at a cost of $4.00. In the 1976 hunting season, in order to hunt elk in Montana, the non-resident was required to purchase a "combination" license ($225.00 fee) which entitled him to take one elk, one deer, and one black bear. The resident was not required to purchase a "combination" license in 1976, but instead could purchase a license solely for elk at a cost of $9.00.

Defendants-Appellees are the Fish and Game Commission of the State of Montana, the individual Fish and Game Commissioners of the State of Montana, and Wesley Woodgerd, Director of the Fish and Game Department of the State of Montana.

The challenge of Plaintiffs-Appellants is based on the privileges and immunities clause of Article IV, Section 2 of the United States Constitution and on the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution.

Plaintiffs' Complaint sought a declaratory judgment that said statutory scheme was unconstitutional, an injunction against enforcement of the statute and damages for each non-resident Plaintiff who had purchased a big game license to the extent that the license fee for non-resident hunters exceeded the costs to the State of Montana "reasonably related to the additional costs of enforcement of the State Fish and Game laws and of contribution to conservation programs." (Complaint, p. 8).

Plaintiffs have taken the position throughout this law suit that the State of Montana could, consistent with the United States Constitution, assess a higher fee for non-resident big game hunting than for residents, but that such higner fee is constitutional only to the extent that it either compensates the State for revenues expended by the State for the added enforcement burden non-residents impose on Montana, if any; and/or, reasonably compensates the State for conservation expenditures made by the State for fish and game purposes from resident-paid taxes. See generally, Mu'aney v. Anderson, 342 U.S. 415 (1952), and Toomer v. Wi 1, 334 U.S. 385 (1948).

A statu three-Judge District Court was convened pursuant to .S.C. 2281.* An evidentiary hearing was held by stip ion before a single Judge and a transcript thereon epared and submitted to the three-Judge Court.

The District Court rendered its decision on August 11, 1976, rejecting all of Plaintiffs' claims (Judge Browning, Circuit Judge, dissenting).

The majority opinion specifically agreed with Plaintiffs that the challenged license fee ratio "...cannot be justified on any basis of cost allocation." (Opinion, p. 4). Nevertheless, the majority opinion held that the privileges and immunities clause is inapplicable; that the challenged classifications, not touching upon a fundamental right, should be reviewed on the "rational relationship" standard; and that the State of Montana could find reasonable basis for the statutory discrimination in the possibility that the political motivation of the Montana

*This statute was repealed on August 12, 1976, P.L. 94-381, 94th Cong., S 537, but such repeal does not apply to any action commencing before that date.

citizenry to underwrite the elk management program might be destroyed if the discrimination were eliminated. (Opinion, pp. 8, 9).

Judge Browning, in dissent, stated that the majority sustained the discrimination "...on a novel theory not suggested by the state or supported by any authority." (Opinion, p. 1, dissent). He relied on Memorial Hospital v. Maricipa County, 415 U.S. 250 (1974), and Cole v. Housing Authority, 435 F. 2d 807 (1st Cir., 1970) for the proposition that "A state may not employ an invidious discrimination to sustain the political viability of its programs. 415 U.S. at 266." (Opinion, p. 3, dissent).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Appellants submit that the actions, opinion and judgment below present substantial questions warranting the acceptance of jurisdiction. The challenge presented by Plaintiffs involves the Montana statutory scheme which discriminates arbitrarily against non-residents who desire to hunt big game, particularly elk, in the State of Montana. Since the challenged burden hinges on the fact of non-citizenship, special questions relating to the "maintenance of our constitutional federalism" are involved. See Austin v. New Hampshire, _____U.S._____, 43 L. Ed. 2d 530 (1975).

Montana presently assesses a fee to the non-resident for the right to hunt elk which is approximately twenty-eight (28) times the fee charged the resident. (See, Opinion, footnote 7, p. 4). Yet, approximately thirty percent (30%) of all land in Montana is Federal land (virtually all of which is accessible to hunters),[1] a

[1]Stipulation No. 25, Pre-Trial Order.

"significant portion" of elk habitat in Montana is on Federal land,[2] and seventy-five percent (75%) of all elk taken by hunters in Montana are taken on Federal lands.[3] Furthermore, the financial contribution to Montana hunting by all citizens of the United States is substantial through the Pittman-Robertson Act, 16 U.S.C. 669, et seq. Thus, while Montana is a member of a nation of States and receives substantial support in various forms for its big game hunting program from the Federal government (and all of the citizens of the nation), it apparently feels free to assess whatever burdens it pleases on non-residents. Indeed, the State of Montana argued below that it could exclude entirely non-residents from hunting in Montana if it so desired.

The position taken by the State of Montana in enacting Section 26-202.1, R.C.M., 1947, and in defending this action indicate that the State is thoroughly insensitive to the obligation of Federal citizenship. Unfortunately, the majority opinion of the District Court has sanctioned this position and has, in fact, left the State of Montana free to increase the burden imposed on non-residents.

[2]Stipulation No. 28, Pre-Trial Order.

[3]Stipulation No. 26, Pre-Trial Order.

A. THE ISSUES PRESENTED ARE SUBSTANTIAL BECAUSE IMPORTANT CONSTITUTIONAL QUESTIONS RELATING TO COMITY AMONG THE STATES ARE INVOLVED

Under the statutory scheme here challenged, the State of Montana is arbitrarily limiting the number of non-residents who may come into the State to hunt big game. Appellants recognize that there may well be a shortage of big game in Montana in relation to the demand to hunt. Appellants recognize that any State has a legitimate police power interest in managing its big game. Appellants also recognize that non-resident hunters may be assessed higher fees by the State of Montana to the extent that such non-residents pose additional costs to the State for enforcement and to the extent that residents pay taxes to support the big game program which non-residents do not bear.

Nevertheless, because Montana is part of our Federal constitutional system, and because all national citizens contribute significantly in diverse ways to the enhancement of hunting in Montana, there are constitutional limits to what the State of Montana can do to limit the number of non-resident hunters. The constitutional concern of the United States Supreme Court relating to discrimination by a State against non-residents was recently set forth in Austin v. New Hampshire, _____U.S._____, 43 L. Ed. 2d 530 (1975):

> In resolving constitutional challenges to state tax measures this Court has made it clear that "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification." (Citing cases). Our review of tax classifications has generally been concomitantly narrow, therefore, to fit the broad discretion vested in the state legislatures. When a

> tax measure is challenged as an undue burden on an activity granted special constitutional recognition, however, the appropriate degree of inquiry is that necessary to protect the competing constitutional value from erosion. See Lehnhausen v. Lake Shore Auto Parts Co., supra, 410 U.S. at 359.
>
> This consideration applies equally to the protection of individual liberties, see Grosjean v. American Press Co., 297 U.S. 233 (1936), and to the maintenance of our constitutional federalism. See Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 164 (1954). (Emphasis added).

The Court further said:

> Since nonresidents are not represented in the taxing State's legislative halls, cf., Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 532-533 (1959) (BRENNAN, J., concurring), judicial acquiescense in taxation schemes that burden them particularly would remit them to such redress as they could secure through their own State; but "to prevent [retaliation] was one of the chief ends sought to be accomplished by the adoption of the Constitution." Travis v. Yale & Towne Mfg. Co., 252 U.S. 60, 80 (1920). Our prior cases, therefore, reflect an appropriately heightened concern for the integrity of the standard of review substantially more rigorous than that applied to state tax distinctions among, say, forms of business organizations or different trades and professions. (43 U.S.L.W. 4401, 4402). (Emphasis added).

Although the Montana big game license fee here under challenge is not technically a tax, the rationale of the Austin decision is nevertheless applicable. Just as in the Austin case, important questions relating to our system of constitutional federalism are involved. The Privileges and Immunities Clause of Article IV, Section 2, was established precisely because of the problem of discrimination by states against non-residents.

In the area of fish and wildlife, the problem is becoming more evident as the country becomes more populated and as recreational time becomes more available to

the average person. A report by the Wildlife Management Institute (1971)[4] states:

> Outdoor recreational uses are increasing dramatically, and there is greater tendency to restrict the nonresident as the competition for space and resource becomes more acute. Strangely enough, this reaction often is more apparent in the States having large expanses of public land, scenery, and wildlife. People who choose to reside in such States obviously relish freedom from crowding. They are possessive about abundant opportunities to hunt and fish, and they make no effort to disguise their dislike of nonresident sportsmen, particularly hunters. As a result, they tend to favor controlling the nonresident by imposing higher fees and quotas long before they will accept more controls over themselves. Politically, it is always easier to impose added costs and new restrictions on nonresidents because they have no voice or vote within a particular state. (pp. 12, 13). (Emphasis added).

The very value the Framers intended to protect through the privileges and immunities clause--comity among the States--is threatened by such discriminatory practices against the non-resident.

The majority opinion below did not respond to the issues presented relating to constitutional federalism. The opinion essentially ignored the Privileges and Immunities Clause. However, the most important problem with the opinion below is that it gives the State carte blanche to continue with its discrimination against non-residents and, indeed, increase it. The ultimate conclusion of the majority, if taken seriously by the States, could have disastrous consequences to our Federal system. The holding of the Court is stated as follows:

> We conclude that where the opportunity to enjoy a recreational activity is created or

[4] In 1971, the International Association of Game and Fish Commissioners commissioned the Wildlife Management Institute to prepare this report on non-resident license fee discrimination. This report is Plaintiffs' Exhibit No. 7.

> supported by a state, where there is no nexus between the activity and any fundamental right, and where by its very nature the activity can be enjoyed by only a portion of those who would enjoy it, a state may prefer its residents over the residents of other states, or condition the enjoyment of the nonresident upon such terms as it sees fit. (Opinion, p. 9) (Emphasis added).

The majority is saying that the State is free to do anything it wants regarding non-residents where no fundamental right is involved. This means Montana could exclude totally non-residents or exclude all non-residents except those who will pay dearly for the opportunity or exclude all but redheaded non-residents. The open-ended nature of the Court's opinion can only be read as sanctioning total freedom on the part of the State to favor residents over non-residents in any way whatsoever, no matter how arbitrary, no matter how attenuated the classification is from legitimate game management purposes. This result contains within it disastrous consequences to our Federal structure.

Montana's "combination" big game license is a good example of an arbitrary requirement imposed on non-residents which does not serve any legitimate fish and game management purposes, but which is sustainable under the lower Court's faulty reasoning. For the 1976 season, non-residents, in order to hunt elk, must purchase the "combination" license which includes one elk, one deer, and one black bear. Section 26-202.1, R.C.M., 1947. Residents can purchase a license solely for elk. Black bears hibernate approximately the middle of the hunting season so the non-resident who comes to Montana during the second half of the season has virtually no opportunity

to take advantage of the bear license. (Tr. 17-18, 296). Furthermore, the demand by non-residents to hunt black bear is minimal. (Tr. 27-28). Most important, however, is the evidence which indicates that the combination license works in part to foster waste of game. There was testimony at trial indicating that some non-residents who are hunting for elk only will come upon an animal of another species and shoot it, not because he wants the animal, but because he has been compelled to purchase a license for it. (Tr. 143-144).

Thus, the "combination" license requirement for non-residents is an arbitrary imposition which serves no legitimate fish and game management purposes in any direct way. Indeed, the majority opinion concedes as much (although the opinion failed to address specifically the combination license issue). Nevertheless, the opinion holds that, because the right is recreational and not fundamental, and since there are more potential hunters than game available, the State is free to "condition the enjoyment of the nonresident upon such terms as it sees fit." (Opinion, p. 9). This, in spite of the fact that seventy-five percent (75%) of the elk taken by hunters in Montana are taken on Federal lands.

Thus, the questions presented are substantial both because sensitive issues of comity between the states are involved and because the opinion of the District Court is such an open-ended sanction to arbitrary discrimination by a state against citizens of other states.

B. THE RULING OF THE DISTRICT COURT THAT THE DISCRIMINATION HAS A "REASONABLE" BASIS BECAUSE POLITICAL SUPPORT BY THE MONTANA CITIZENRY FOR THE GAME PROGRAM MIGHT ERODE IN THE ABSENCE OF SUCH DISCRIMINATION PRESENTS IMPORTANT FEDERAL QUESTIONS CONCERNING WHETHER SUCH JUSTIFICATION HAS A PLACE IN OUR CONSTITUTIONAL SYSTEM

The present suit was lodged by Plaintiffs challenging the Montana big game license fee discrimination against non-residents and challenging the arbitrary imposition of the "combination" license upon non-residents, but not residents. The primary basis of Plaintiffs' Complaint is the privileges and immunities clause of Article IV, Section 2, Clause 1, of the United States Constitution, which provides:

> The citizens of each state shall be entitled to all privileges and immunities of citizens of the several states.

It is well established that this clause applies to state regulation of fish and game. Mullaney v. Anderson, 342 U.S. 415 (1952); Toomer v. Witsell, supra. In the Mullaney case, the territorial legislature of Alaska provided for the licensing of commercial fishermen in territorial waters, imposing a $5.00 license fee on resident fishermen and a $50.00 fee on non-residents. The Supreme Court found the non-resident license fee invalid under the privileges and immunities clause, Article IV, Section 2, Clause 1. The Court cited with approval the holding of Toomer v. Witsell, supra, that the state may only "charge non-residents a differential which would merely compensate the state for any added enforcement burden they might impose or for any conservation expenditures from taxes which only residents pay." (At 417). (Emphasis added).

The State of Montana attempted to justify the license fee differential in the present case by arguing that the differential was based on additional enforcement and conservation costs imposed by non-residents to the State of Montana. The majority opinion of the District Court specifically found that the ratio in the State of Montana between the fees assessed non-resident hunters to those assessed resident hunters "cannot be justified on any basis of cost allocation, even with due regard to the presumption of constitutionality." (Opinion, p. 4.) (Emphasis added). Nevertheless, the majority opinion found that the discrimination against non-residents by the State of Montana in their hunting fees is not unconstitutional under the minimal scrutiny test because the Montana Legislature might reasonably make a judgment that the elimination of discrimination against non-resident hunters "might destroy the political motivation to Montana citizens to underwrite the elk management program in the absence of which the species might disappear." Parenthetically, it should be noted that there is little factual basis in the record to support the assumption of the majority concerning what it thought to be critical importance of political support of the Montana citizenry. Only approximately two percent (2%) of the budget of the Fish & Game Department of the State of Montana comes from the general fund (general tax fund) of the State of Montana.[5] The Montana Department of Fish and Game is heavily dependent on license fee income and particularly dependent on revenues derived from non-resident hunters and fishermen (approximately

[5]See Plaintiffs' Exhibit No. 1, Montana Executive Budget.

2/3rds of the Fish and Game Department's license revenue comes from non-residents).[6] Thus, without referring to the evidence, the majority opinion grossly over-estimates the importance of the support of the people of Montana for the fish and game management program in the state.

The most important issue, however, is the substantive legitimacy of the attempt by the District Court to find a conceivably reasonable justification for the discriminatory policies against non-residents in the fact that political support might dwindle if the discrimination were not continued. This issue presents a substantial Federal question which this Court should review. This issue was framed by Judge Browning in his dissent as follows:

> In more general terms, the principal (of the majority) appears to be that the state may burden access by nonresidents to a finite local resource in order to increase the share available to residents and thereby maintain a political base within the state for the support of state efforts to conserve the resource. Put in another way, a state may justify the constitutionality of a discriminatory statute by showing that political support by the class of people to be benefited by the discrimination is necessary in order to continue the program that benefits them. (Opinion, p. 2, 3, dissent).

This is a dangerous attitude for a Federal Court to take in justification of a discrimination by a state against non-residents. Virtually any discrimination by a state against non-residents, no matter how invidious or noxious, could be justified on similar basis. This Court has rejected the invocation of local political support as a constitutional justification for discrimination. In Memorial Hospital v. Maricopa County, Supra, the Supreme

[6]Transcript, p. 34.

Court stated "a state may not employ an invidious discrimination to sustain the political viability of its program." (At 266).

The Supreme Court in the Maricopa County case cited with approval Cole v. Housing Authority, supra, invalidating a city's durational residency requirement for access to low-income housing projects. In Cole, the city argued that durational residential requirement was "often the key to survival of [public] housing" because voters believe such a restriction to be necessary to avoid benefiting newcomers as against long-time residents. The Court of Appeals rejected this reasoning, stating, "the objective of achieving political support by discriminatory means... is not one which the constitution recognizes." (435 F. 2d 813) See also, West Virginia Board of Education v. Barnette, 319 U.S. 624, 638 and Lucas v. Colorado General Assembly, 377 U.S. 713, 736 (1963). See also Griffin v. County School Board, 377 U.S. 218 (1964). (In Griffin, the County School Board closed down its public schools entirely rather than comply with the desegregation decisions of the United States Supreme Court. It is arguable that elimination of the discrimination in compliance with the United States Constitution would have eroded, and in fact did erode, public support of the school system in the county. Nevertheless, the Court found unconstitutional the attempt of the county to close down the public schools holding that the mandate of the United States Constitution could not be avoided in such manner.)

In Edwards v. California, 314 U.S. 160 (1941), the Supreme Court faced an attempt by the State of California

by legislation to block indigents from coming into the state. Although the statute was invalidated under the Interstate Commerce Clause, the Court made the following observation which is pertinent to the present case:

> ...Moreover, the indigent non-residents who are the real victims of the statute are deprived of the opportunity to exert political pressure upon the California legislature in order to obtain a change in policy...
>
> ...
>
> ...The prohibition against transporting indigent non-residents into one state is an open invitation to retaliatory measures.

Similarly, in the present case, if the State of Montana can justify its discrimination on such tenuous grounds, the possibilities for retaliatory measures by sister states becomes almost infinite.

In a case very closely on point, a District Court in Brown v. Anderson, 202 F. Supp. 96 (1962), faced a challenge to an Alaska statute which allowed the state commission to close off certain waters to non-resident salmon fisherman if it appeared that there would not be adequate salmon in such waters to perpetuate the population. The state argued that the provision was reasonable in that it would possibly prevent the destitution of residents (should the salmon fishery become depleted). Alaska argued such residents would become "a burden upon the citizens of Alaska and not on non-residents", (pp. 101-102). The District Court rejected this argument stating:

> There is no exception in the privileges and immunities clause providing for differentiation on the basis of the general welfare of citizens of any state. If such were the case it would be possible to couch a legislative act in such words as to regulate almost all types of endeavor on the sole basis of welfare. We cannot agree with defendants that there is any authority to avoid the effect of the privileges and immunities clause solely under the guise of avoiding economic

losses to residents. The act cannot be sustained on the basis that this is a reasonable basis for difference in application. (Emphasis added).

Also in Russo v. Reed, 93 F. Supp. 554 (1950) (striking down as a denial of privileges and immunities a Maine statute which prohibited non-residents from commercially fishing in the Maine coastal waters in the summer months), the Court stated:

> Application of this principal (privilege and immunities clause) leaves no doubt in our minds that the Maine statute under consideration is invalid. It is not a conservation measure in that it limits the size of fish taken, the size of the catch, or the season for fishing. Such affect as it may have upon conserving the supply of fish arises only from the fact that non-residents as a class are prohibited from fishing in the coastal waters of the state during the summer season, the only time when whiting can be taken in that area...(At 561) (Emphasis added).

In contrast to the authority cited above, the majority opinion cited none. Instead it baldly concluded that is is not unreasonable for the Montana Legislature to worry about erosion of local political support and to base a discriminatory policy against non-residents upon such concern. Since virtually any discriminatory policy, whether against non-residents or other classes, could be justified in a similar way, the ramifications of the District Court ruling are serious. The Federal questions presented are substantial and should be reviewed by the Court.

MONTANA'S STATUTOTY SCHEME RELATING TO NON-RESIDENT BIG GAME HUNTING IS UNCONSTITUTIONAL

The Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution applies to issues of discrimination by a state against non-residents in the administration of fish and game laws. In Toomer v. Witsell, supra, the United States Supreme Court faced a requirement of the State of South Carolina which required non-residents of South Carolina to pay a license fee of $2,500.00 for each shrimp boat which operated in South Carolina's coastal waters, but required residents to pay only a fee of $25.00. The Court held that this discrimination violates the Privileges and Immunities Clause, Article IV, Section 2, of the United States Constitution. The Court stated with regard to this clause:

> The primary purpose of this clause, like the clauses between which it is located--those relating to full faith and credit and to interstate extradition of fugitives from justice--was to help fuse into one Nation a collection of independent sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy. For protection of such equality the citizen of State A was not restricted to the uncertain remedies afforded by diplomatic processes and official retaliation.
>
> "Indeed, without some provision of the kind removing from the citizens of each state the disabilities of alienage in the other states, and giving them equality of privilege with citizens of those states, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists." Paul v. Virginia, 8 Wall. 168, 180 (1868).

PP. 395, 396 (Emphasis added)

See also Mullaney v. Anderson, supra.

As recently as the 1974 term, the United States Supreme Court applied the Privileges and Immunities clause

to a question relating to an imposition of a tax burden based on the fact of non-residency. Austin v. New Hampshire, _____U.S._____, 43 L. Ed. 2d 530 (1975). In that case, the Court faced a challenge to the New Hampshire Commuters Income tax, the effect of which was that New Hampshire "taxes only the incomes of non-residents working in New Hampshire." (43 U.S.L.W. 4400). The Court (Marshall, J.) found the law unconstitutional, stating:

> The Privileges and Immunities Clause, by making non-citizenship or nonresidency an improper basis for locating a special burden, implicates not only the individual's right to nondiscriminatory treatment but also, perhaps more so, the structural balance essential to the concept of federalism. 43 U.S.L.W. 4401, 4402. (Emphasis added).

In discussing the underlying purpose of the Privileges and Immunities Clause, the Austin Court stated:

> The origins of the clause do reveal, however, the concerns of central import to the Framers. During the preconstitutional period, the practice of some States denying to outlanders the treatment that its citizens demanded for themselves was widespread. 43 U.S.L.W. 4401.

The Court states further:

> Thus, in the first and long the leading explication of the clause, Mr. Justice Washington, sitting as Circuit Justice, deemed the fundamental privileges and immunities protected by the clause to be essentially coextensive with those calculated to achieve the purpose of forming a more perfect Union, including "an exemption from higher taxes or impositions than are paid by the other citizens of the state." Corfield v. Corywell, 6 F. Cas. 546, 552 (No. 3230) CCED Pa., 1825. 43 U.S.L.W. 4401.

See also the recent case, Doe v. Bolton, 410 U.S. 179 (1973) at 200, holding that the privileges and immunities clause, Article IV, Section 2, "protects persons who enter Georgia seeking the medical services that are available there."

Lower Court cases dealing specifically with fish and game discrimination issues have followed the reasoning in Toomer, supra, and Mullaney, supra. In Gospodonovich v. Clements, 108 F. Sup. 234 (1953), the Court faced a challenge to a Louisiana state statute which discriminated against non-residents in the regulation of commercial fishing off the Louisiana coast. The Court, holding the Louisiana statute unconstitutional under the Privileges and Immunities Clause, said:

> It is clear that the distinction between the two types of licenses required by the statutes, for both commercial fishing boats and commercial fisherman, is based solely upon citizenship... (P. 236)
>
> ...These are not conservation measures, they are intended to exclude non-residents from pursuing a common calling of citizens of states bordering on the Gulf of Mexico... (P. 237)

See also, Steed v. Dogen, 85 F. Supp. 956 (W.D. Tex., 1949),holding unconstitutional Texas law which assessed drastically lower license fees for shrimpers who are Texas residents as opposed to non-residents; and Edwards v. Leaver, 102 F. Supp. 698 (D. R.I., 1952), striking down state statute limiting commercial fishing licenses to residents violative of the privileges and immunities clause. See also, Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948), involving the equal protections clause of the Fourteenth Amendment).

The state, in arguing the case below, attempted to distinguish these cases under the privileges and immunities clause on the grounds that the present case poses an issue of recreational hunting as opposed to commercial hunting. This distinction is without merit. In State v. Jack, 539

P. 2d 726 (Mont., 1975), the Montana Supreme Court ruled that Montana's law requiring non-resident hunters to employ local guides while hunting in Montana violated the Federal equal protection clause. Also, in Schakel v. State, 513 P. 2d 412 (Wyo., 1973), the Wyoming Supreme Court ruled unconstitutional on equal protection grounds a similar statute.

The State of Montana also argued below that the State maintained "ownership" over the wild game in the State in its sovereign capacity and that, therefore, a Federal Court is without power to intervene in management decisions of the State relating to its fish and game. This antiquated ownership doctrine was laid to rest in Missouri v. Holland, 252 U.S. 416, Takahashi v. Fish and Game Commission, and Toomer v. Witsell, supra. In Toomer, the Court said:

> The whole ownership theory, in fact is now generally regarded as a fiction expressive in legal shorthand of the importance to its people that the state have powers to preserve and regulate the exploitation of an important resource. And there is no necessary conflict between that vital policy consideration and the constitutional command that the state exercise that power, like its other powers, so as not to discriminate without reason against citizens of other states. (At. 402).

More recently, this Court faced a constitutional challenge to the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. (Sup. IV) Sections 1331-1340, Kleppe v. New Mexico, ____U.S.____, 44 U.S.L.W. 4878. There the Court said:

> Appellees' contention that the Act violates traditional state power over wild animals stands on no different footing. Unquestionably, the states have broad trustee and police powers over wild animals within their jurisdictions.

> Toomer v. Witsell, 334 U.S. 385, 402 (1948); Lacoste v. Department of Conservation, 263 U.S. 545, 549 (1924); Geer v. Connecticut, 161 U.S. 519, 528 (1896). But as Geer v. Connecticut cautions, those powers exist only "insofar as their exercise may not be incompatible with, or restrained by, the rights conveyed to the federal government by the constitution." 161 U.S. at 528. No doubt it is true that as between a state and its inhabitants the state may regulate the killing and sale of [wildlife] but it does not follow that its authority is exclusive of paramount powers. Missouri v. Holland, 252 U.S. 416, 434 (1920). Thus, the privileges and immunities clause, U.S.Const., Art. IV, Sec. 2, Cl. 1, precludes a state from imposing prohibitory license fees on nonresidents shrimping in its waters. Toomer v. Witsell, supra;... 44 U.S.L.W. 4883

Thus, it is well established that the "ownership" theory, whatever its merits, cannot be invoked to defeat basic constitutional limitations.

For the foregoing reasons, Appellants respectfully submit that the lower Court erred in its holding that the Montana license fee structure does not violate the Constitution. Because the questions presented are substantial, Appellants respectfully urge the Court to review the case.

THIS CASE IS NOT MOOT

The present challenge is lodged against the discriminatory license fee structure for big game in Montana for the 1975 and 1976 seasons. (Section 26-202.1, R.C.M., 1947). By the time this appeal is reviewed, those seasons will have elapsed. It is therefore arguable that this case is moot. However, it should be noted that, in addition to injunctive relief, Plaintiffs requested damages to the extent that they paid unconstitutionally excessive license fees for those seasons. (See Complaint, p. Therefore, an actual controversy still presently exists.

Furthermore, the present case presents a question that is "capable of repetition, yet evading review." Southern Pacific Terminal Co. v. I.C.C., 219 U.S. 498, 515 (1911); Roe v. Wade, 410 U.S. 113, 125 (1973). The non-resident "combination" big game license has been required in Montana for many years in one form or another. The license fee structure which discriminates against the non-resident has also been a routinely renewed provision of Montana law for years even though the precise figures have varied from year to year.

For these reasons, Appellants respectfully submit that this Court should exercise review.

CONCLUSION

For the foregoing reasons it is submitted that the present case presents issues substantial enough to merit full review by the Court.

Dated this 8th day of October, 1976.

GOETZ & MADDEN

By _____
JAMES H. GOETZ
522 West Main Street
P. O. Box 1322
Bozeman, Montana 59715

CERTIFICATE OF SERVICE

I, JAMES H. GOETZ, attorney for Appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 8th day of October, 1976, I served copies of the foregoing Jurisdictional Statement on the parties named hereunder, pursuant to

Rule 33, as follows:

Clayton R. Herron, Esq.
Attorney at Law
P. O. Box 783
Bozeman, Montana 59601

Sherman V. Lohn, Esq.
Attorney at Law
P. O. Box 1287
Missoula, Montana 59801

Chapman, Duff & Lenzine
Attorneys at Law
1709 New York Avenue, N.W.
Washington, D. C. 20006

_____
JAMES H. GOETZ
522 West Main Street
P. O. Box 1322
Bozeman, Montana 59715

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

FILED

10312 1976

JOHN E. PLEMMONS, CLERK
By Dora Lou Sevener
Deputy Clerk

MONTANA OUTFITTERS ACTION GROUP, LESTER BALDWIN, RICHARD CARLSON, JEROME J. HUSEBY, DAVID R. LEE, and DONALD J. MORIS,

Plaintiffs,

v.

FISH AND GAME COMMISSION OF THE STATE OF MONTANA; WESLEY WOODGERD, Director of the Department of Fish and Game of the State of Montana; ARTHUR HAGENSTON; WILLIS B. JONES; JOSEPH J. KLABUNDE; W. LESLIE PENGELLY and ARNOLD RIEDER, Commissioners of the Fish and Game Commission of the State of Montana,

Defendants.

CV 75-80-BU

OPINION

Before: BROWNING, Circuit Judge, and SMITH and JAMESON, District Judges

PER CURIAM:

This case is about elk and the rights of nonresidents to hunt them.1/ The elk, once a plains animal, now lives in the mountains in central and western Montana. The elk is migratory in the sense that it moves from the summer range to

1/ While there are disparities in the price of resident and nonresident fees for other fish and game licenses, only the combination license which permits the nonresident to hunt elk is drawn into controversy here.

the winter range and back, and when this sort of migration occurs near the borders of Montana, the elk drift to and from Montana, Idaho, Wyoming, and Canada. The summer range is in the mountains, and a significant part of it is federally owned. The winter range is in the foothills and valleys, a significant part of which is in private ownership. About 75% of the elk killed are killed on federal lands. The elk is not and never will be hunted commercially. It is an animal much sought for its trophy value, and nonresident hunters are as a group more interested in the trophy than are the resident hunters as a group. In recent years there has been an increase in the number of hunters and a disproportionate increase in the number of nonresident hunters. In the years between 1960 and 1970 there was an increase of 536% in nonresident hunting as compared with an increase of 67% in resident hunting.2/ The preservation of the elk depends upon conservation.

R.C.M. 1947 § 26-202.1(12) provides for a nonresident big game combination license and fixes the fee therefor. A nonresident may not hunt elk without the combination license. The license fee for the 1976 hunting season will be $225.00, and for that fee the nonresident is permitted to take one elk, one deer, one black bear, upland birds, and fish. A

2/ All of the State's objections to the introduction of evidence, which were reserved, are now overruled.

resident[3] will be able to hunt elk in 1976 by the payment of $8.00 for an elk tag[4] and $1.00 for a conservation license.[5]

While a resident is not required to buy any combination of licenses, the cost to him of all of the privileges granted by the nonresident combination license would be $30.00.[6] The ratio is, therefor, 7.5 to 1 in favor of the resident. The claim is that these licensing provisions are discriminatory and in violation of the privileges and immunities clause (art. IV, § 2) and the equal protection and due process clauses (amend. XIV) of the United States Constitution. Plaintiffs concede that the State may constitutionally charge nonresidents more for hunting and fishing privileges than residents because residents, through taxes other than hunting and fishing license fees, contribute to the wildlife management program, but urge that the degree of the disparity cannot be justified on a cost

---

3/ R.C.M. 1947 § 26-202.3(2) provides:
"Any person who has been a resident of the state of Montana, as defined in section 83-303, for a period of six (6) months immediately prior to making application for said license shall be eligible to receive a resident hunting or fishing license."
R.C.M. 1947 § 83-303 provides:
"Every person has, in law, a residence. In determining the place of residence the following rules are to be observed:
"1. It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose . . . ."

4/ R.C.M. 1947 § 26-202.1(4).

5/ R.C.M. 1947 § 26-230.

6/ R.C.M. 1947 § 26-202.1 (1), (2), and (4), and R.C.M. 1947 § 26-230.

basis. While no records are kept which precisely disclose the direct and indirect costs which properly may be apportioned between residents and nonresidents, the plaintiffs did offer the opinion evidence of an economist to the effect that a ratio of no more than 2.5 to 1 can be justified costwise. On a consideration of that evidence, the State's evidence opposing it, and with due regard to the presumption of constitutionality, we find that the ratio of 7.5 to 1 cannot be justified on any basis of cost allocation.[7]

Defendants challenge the plaintiffs' standing. The plaintiffs Moris and Lee are nonresidents who have hunted for elk in Montana in the past and who want to hunt in Montana in the future. They are obviously adversely affected by an increase in nonresident license fees and have standing to maintain this action. The economic interests of Moris and Lee are affected, and that is sufficient. Sierra Club v. Morton, 405 U.S. 727 (1972). Since all issues are presented

---

7/ For a nonresident who wanted to hunt and hunted elk, and elk alone, the ratio is 28.2 to 1. Some part of the difference between the 28.2 to 1 and the 7.5 to 1 ratios may be justified by arguments made in support of the combination license, but, in view of our determination that the fee discrimination at a 7.5 to 1 ratio is not justified costwise, we approach the legal problems involved without resolving the arguments pro and con as to whether the discrimination caused by the combination license is justified.

by Moris and Lee, we do not pass upon the standing of the remaining plaintiffs.[8/]

Defendants suggest that there is no justiciable controversy because the law governing the 1976 hunting season will not be effective until July 1, 1976; the 1975 hunting season is over, and the law governing it cannot affect the plaintiffs.[9/] The problems here raised are those which are "'capable of repetition, yet evading review.'" Roe v. Wade, 410 U.S. 113, 125 (1973). Had plaintiffs waited until July 1, 1976, to commence this action, it is unlikely that a resolution at this court level would be obtained until the 1976 hunting season was over. Absent a repeal of the challenged law, unlikely since the Montana legislature will not meet until January 1977, the plaintiffs will be affected by the present law, and there is now a controversy. We hold the controversy to be justiciable.

The State argues with some support in the authorities that the State owns the animals in their wild state in trust

8/ The plaintiffs are four nonresident hunters, one licensed outfitter, and the Montana Outfitters Action Group, composed of seven licensed outfitters and seven dude ranchers and nonresident hunters. Amicus curiae briefs supporting the validity of the statute were filed by the Montana Outfitters and Guides Association, representing 123 outfitters, and by the International Association of Game, Fish and Conservation Commissioners, representing the wildlife agencies of all 50 states, Canada, Puerto Rico, and Mexico.

9/ While we do not consider the law governing the 1975 hunting season (R.C.M. 1947 § 26-202.1) as it existed prior to the 1975 amendments (Laws of Montana 1975, ch. 91, § 1, ch. 417, § 1, ch. 546, § 1) we do note that the arguments now addressed to R.C.M. 1947 § 26-202.1 as it now exists are equally applicable, except perhaps in degree, to the prior law.

for the beneficial use of the citizens of the State, and that the State may do what it will with its own property.[10/] The plaintiffs contend with some support in the authorities that "[t]he whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource."[11/] We do not here choose between the theories advanced. The State under either theory has the power to manage and conserve the elk, and to that end to make such laws and regulations as are necessary to protect and preserve it.

Whether, in that management, a discrimination between residents and nonresidents is permissible requires an examination of the claimed right, the State purpose involved, and the justifications for the discrimination.

We turn to the nature of the right asserted by the plaintiffs in this case. Not everyone may hunt elk. There

10/ The cases of Geer v. Connecticut, 161 U.S. 519 (1896); McCready v. Virginia, 94 U.S. 391 (1876); In re Eberle, 98 F. 295 (N.D.Ill. 1899), and some language in Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928), lend support to this view. Because of the involvement of elk with the lands of the sovereign United States, the ownership analysis is not as readily applicable to elk as it might be to the Chinese pheasant.

11/ The quotation is from Toomer v. Witsell, 334 U.S. 385, 402 (1948). In Missouri v. Holland, 252 U.S. 416, 434 (1920), Mr. Justice Holmes said, "To put the claim of the State upon title is to lean upon a slender reed." This language was quoted with approval in Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948), and in Toomer v. Witsell, supra. All of the cases cited in this footnote were concerned with migrating fish and birds. The movement of the elk is more a drifting than a true migration.

are too many people and too few elk. If the elk is to survive as a species, the game herds must be managed, and a vital part of the management is the limitation of the annual kill. That limitation may be accomplished in many ways, but all of them involve in some degree a limitation upon hunter days.[12/] The hunter days may be controlled by pricing the license, by conducting lotteries, by limiting the length of the seasons, and by restricting the area of the hunt. Any controlling device, by reason of its effect upon the life circumstances of a potential hunter, may deprive that hunter of any possibility of hunting elk.

Whatever word may be used to describe plaintiffs' asserted rights -- right, privilege, chance -- the asserted right is recreational in character,[13/] and except for a few residents who live in exactly the right place, is expensive recreation. Critically examined, the right asserted here is, therefore, no more than a chance to engage temporarily in a recreational activity in a sister state, and even the chance is dependent upon the willingness of the people of the sister

---

12/ Each day that one hunter is in the field is a hunter day.

13/ We believe that this is sufficient to distinguish this case from Takahashi v. Fish and Game Comm'n, supra; Toomer v. Witsell, supra; and Mullaney v. Anderson, 342 U.S. 415 (1952), all of which were concerned with the fundamental right to pursue a calling or business. In American Communters Ass'n, Inc. v. Levitt, 279 F.Supp. 40 (S.D.N.Y. 1967), aff'd, 405 F.2d 1148 (2d Cir. 1969), the district court expressly distinguished between noncommercial fishing licenses and "commercial fishing rights involving interstate commerce." 279 F.Supp. at 48.

State to manage the subject matter of the recreation -- the elk. The asserted right is not fundamental[14/] and is not protected as a privilege and immunity by art. IV, § 2 of the United States Constitution. United States v. Wheeler, 254 U.S. 281 (1920); Canadian Northern Ry. v. Eggen, 252 U.S. 553 (1920); and Blake v. McClung, 172 U.S. 239 (1898).

We cannot ignore the nature of the right involved in treating the equal protection problem. If the needs for education at the primary level[15/] and at the college level[16/] do not create the fundamental sort of rights which have constitutional protection under the equal protection clause, then certainly the asserted right in this case does not have a constitutional basis and is not fundamental for equal protection purposes. There is simply no nexus between the right to hunt for sport and the right to speak, the right to vote, the right to travel, the right to pursue a calling. We are not, therefore, required to scrutinize the discrimination strictly but only to determine whether the system bears some rational relationship to legitimate State purposes.[17/]

The State purpose is to restrict the number of hunter days. Any regulatory system which imposes a license fee in some sense discriminates against those who can't afford to pay it. As the

---

14/ See Black v. McClung, infra, at 248.

15/ San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

16/ Sturgis v. Washington, 368 F.Supp. 38 (W.D.Wash. 1973), aff'd, 414 U.S. 1057 (1973).

17/ San Antonio Independent School District v. Rodriguez, supra; Hughes v. Alexandria Scrap Corp., ____U.S. ____, 44 U.S.L.W. 4959.

fee increases, the discrimination increases. A regulatory scheme based upon a pure lottery in which a limited number of hunters were chosen would be discrimination-free, but a legislature might with some rationality[18/] conclude that a pure lottery open to all potential elk hunters in the United States might destroy the political motivation to Montana citizens to underwrite the elk management program in the absence of which the species would disappear.[19/]

We conclude that where the opportunity to enjoy a recreational activity is created or supported by a state, where there is no nexus between the activity and any fundamental right, and where by its very nature the activity can be enjoyed by only a portion of those who would enjoy it, a state may prefer its residents over the residents of other states, or condition the enjoyment of the nonresident upon such terms as it sees fit.[20/]

IT IS THEREFORE ORDERED that judgment be entered denying plaintiffs all relief.

DATED this 11th day of August 1976.

18/ If the conclusion is rational, the presumption of constitutionality would require us to consider it.

19/ Were a Montana resident's chances to hunt calculated purely on a population basis, Montana residents would get .34% of the elk licenses issued. On the basis of all elk licenses issued in 1973 (107,675), and the population in 1970 (Montana: 694,409; United States: 203,235,298), Montana residents would have received 366 of them (694,409 divided by 203,235,298, multiplied by 107,675). This figure is unrealistic because in any sort of a drawing allocating licenses, the proportion of applications from Montana to the population of Montana would exceed the proportion of applications from other states to the populations of those states. Montana residents can hunt more cheaply, and probably, because of their proximity to it, are more attracted by hunting. Even so, a legislature looking at the facts might conclude that some relatively small percentage of Montana hunters would be licensed if nonresidents and Montana residents were treated equally.

20/ The results reached in the cases of Geer v. Connecticut, supra, n. 10; McCready v. Virginia, supra, n. 10; In re Eberle, supra, n. 10; and State v. Kemp, 73 S.D. 458, 44 N.W. 2d 214 (1950), appeal dismissed for want of a substantial federal question, 340 U.S. 923 (1951), are in accord with the result reached here.

UNITED STATES GOVERNMENT

Memorandum

TO : CLERK OF COURT - Butte
DATE: August 11, 1976
COPIES: JUDGES BROWNING and JAMESON

FROM : JUDGE SMITH

SUBJECT: Montana Outfitters v. Fish and Game Comm'n - CV 75-80-BU

I certify that Judge Jameson concurs with me in the attached per curiam. Please file it with Judge Browning's dissent attached.

Russell E. Smith
United States District Judge

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

MONTANA OUTFITTERS ACTION GROUP
v. FISH AND GAME COMMISSION - No. 75-80-BU

BROWNING, Circuit Judge, dissenting:

The majority recognizes that the "ownership theory" espoused in early Supreme Court opinions is denigrated in more recent pronouncements. See Toomer v. Witsell, 334 U.S. 385, 402 (1948). Also in disrepute is the "special public interest" theory occasionally advanced to justify state discrimination in favor of its own citizens in matters of "privilege" as distinguished from "right." See Sugarman v. Dougall, 413 U.S. 634, 643-45 (1973); Graham v. Richardson, 403 U.S. 365, 372-74 (1970). All that remains is the traditional Equal Protection issue: Does the higher license fee charged nonresidents for hunting elk in the state serve a legitimate state purpose?

The contention most strongly pressed by the state is that the difference in license fee serves the legitimate purpose of imposing upon nonresidents a fair share of the cost of maintaining the elk herd. As the majority finds, however, "the ratio of 7.5 to 1 [or 28.2 to 1] cannot be justified on any basis of cost allocation." The majority does not discuss the other purposes advanced by the state to support the discrimination -- implying (and I agree) that there is no reasonable relationship between the discriminatory license fee and any of the other purposes advanced by the state. Each such justification is shown by the record to be either logically or factually unsupportable.

The majority nonetheless sustains the discrimination

-/-

75-80-BU

on a novel theory not suggested by the state or supported by any authority.*

The ultimate state interest relied upon by the majority is the unquestionably legitimate and important one of conservation. The asserted relationship between the discriminatory license fee and conservation is not direct. The state employs discrimination, the majority suggests, to further conservation in an indirect and, in my opinion, impermissible way.

The majority holds the discrimination against nonresidents to be justified because the state might rationally conclude that if nonresidents were not discriminated against and thereby discouraged from participating in the elk hunt, the number of residents who could participate would be so small that the residents would be unwilling to maintain a vigorous conservation program. In short, an otherwise invidious discrimination against nonresidents is justified because the state may rationally consider the discrimination necessary to induce residents to support the state program required to conserve the herd.

In more general terms, the principle appears to

*The majority states (note 20) that the result reached in this case is in accord with the results reached in Greer v. Connecticut, 161 U.S. 519 (1896); McCready v. Virginia, 94 U.S. 396 (1876); In re Eberle, 98 Fed. 295 (N.D. Ill. 1899); and State v. Kemp, 73 S.D. 458, 44 N.W.2d 214 (1950), appeal dismissed for want of a substantial federal question 340 U.S. 923 (1951). As the majority notes (note 10), the first three cases rest on the "ownership theory," rejected in subsequent decisions, and, in any event, not readily applicable to elk, 75% of which are killed on federal lands. Dismissal by the Supreme Court of the appeal in State v. Kemp did not involve a ruling that the discrimination was constitutional. The statement filed in the Supreme Court in opposition to jurisdiction pointed out that violations of state statutes not claimed to be unconstitutional had occurred that were sufficient to sustain the conviction.

-2-

FPI-Sandstone
8-3-72-10M-9401

be that the state may burden access by nonresidents to a finite local resource in order to increase the share available to residents and thereby maintain a political base within the state for the support of state efforts to conserve the resource. Put in another way, a state may justify the constitutionality of a discriminatory statute by showing that political support by the class of people to be benefited by the discrimination is necessary in order to continue the program that benefits them.

I do not believe discrimination for such a purpose is permitted by the Equal Protection Clause.

Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974), involved a constitutional challenge to an Arizona statute requiring a year's residence as a condition to an indigent receiving non-emergency medical care at county expense. The state argued that "the requirement is necessary for public support" of modern and effective public medical facilities because the voters believed the requirement protected them from an influx of low-income families such facilities would otherwise attract. The Supreme Court rejected the argument, stating, "A State may not employ an invidious discrimination to sustain the political viability of its programs." 415 U.S. at 266.

The Supreme Court cited with approval Cole v. Housing Authority, 435 F.2d 807, 812-13 (1st Cir. 1970), invalidating a city's durational residency requirement for access to low-income housing projects. In Cole, the city argued that a durational residential requirement was "often the key to survival of [public] housing" because voters believed such a restriction to be necessary to avoid benefiting newcomers as against longtime residents. The

3-

FPI-Sandstone
8-3-72-10M-9401

Court of Appeals rejected this reasoning, stating, "The objective of achieving political support by discriminatory means . . . is not one which the constitution recognizes." 435 F.2d at 813.

Memorial Hospital and Cole involved infringement of fundamental rights that could be justified only by a compelling state interest. But this does not make them inapplicable. These cases rejected justification of discrimination on political grounds because justification on such a basis is inherently inappropriate, not because the right infringed was fundamental.

A holding that discrimination by the state may be justified by showing that the state could rationally believe such discrimination was necessary to secure political support for a program in the public interest, would lead inevitably, if indirectly, to the conclusion that invidious discrimination can be justified by popular disapproval of equal treatment. As the court said in Cole, such a rule "would rationalize discriminatory classifications which are constitutionally impermissible." 435 F.2d at 812. Addressing essentially the same point in Memorial Hospital, the Supreme Court said: "'[p]erhaps Congress could induce wider state participation in school construction if it authorized the use of joint funds for the building of segregated schools,' but that purpose would not sustain such a scheme." 415 U.S. at 267, quoting Shapiro v. Thompson, 394 U.S. 618, 641 (1969).

The majority's rationale is at odds with the principle that constitutional rights are not subject to abrogation by majority will. As the Court said in West Virginia Board of Education v. Barnette, 319 U.S. 624, 638

(1942): "The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversies, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." See also Lucas v. Colorado General Assembly, 377 U.S. 713, 736 (1963).

The rule applied by the majority is impossible to limit. It would immunize even the most arbitrary discrimination from constitutional attack whenever it could be contended reasonably that the discrimination was necessary to obtain political support for the state activity.

Access to outdoor recreation is increasingly important to our society. It is significant, for example, that the number of visitors to national and state parks doubled in the decade 1960-1970. U.S. Department of Commerce, Statistical History of the United States 1970. In fact if [illegible], recreational resources constitute a vital national asset. The sentiment that state residents have a preferred claim to such resources within the state is unworthy of protection "under a Constitution which was written partly for the purpose of eradicating such provincialism." Cole v. Housing Authority, supra, 435 F.2d at 813.

I would hold Montana's discriminatory license fee unconstitutional.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BUTTE DIVISION

* *

MONTANA OUTFITTERS ACTION GROUP, LESTER BALDWIN, RICHARD CARLSON, JEROME J. HUSEBY, DAVID R. LEE, and DONALD J. MORIS,

Plaintiffs,

-vs-

FISH & GAME COMMISSION OF THE STATE OF MONTANA; WESLEY WOODGERD, Director of the Department of Fish & Game of the State of Montana; ARTHUR HAGENSTON; WILLIS B. JONES; JOSEPH J. KLABUNDE; W. LESLIE PENGELLY; and ARNOLD RIEDER, Commissioners of the Fish & Game Commission of the State of Montana,

Defendants.

No. 75-80-BU

NOTICE OF APPEAL
TO THE
SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that Montana Outfitters Action Group, Lester Baldwin, Richard Carlson, Jerome J. Huseby, David R. Lee, and Donald J. Moris, Plaintiffs above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the District Court entered in this action on August 11, 1976.

This appeal is taken pursuant to 28 U.S.C. §1253.

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Plaintiffs' Complaint
2. Defendants' Answer
3. Pre-Trial Order
4. Volumes I, II and III of the transcript of the Evidentiary Hearing
5. Plaintiffs' Exhibit No. 5

6. Plaintiffs' Exhibit No. 6

7. Plaintiffs' Exhibit No. 7

III. The following questions are presented by this appeal:

1. Whether the Montana statutory scheme relating to big game license fees which imposes substantially nigher license fees on non-resident hunters and which requires that non-resident hunters, but not resident hunters, purchase a "combination" license for various big game in Montana, denies to non-resident hunters their constitutional rights guaranteed them under Article IV, Section 2 (Privileges and Immunities) and the Fourteenth Amendment (Equal Protection) of the United States Constitution.

2. Whether the Montana statutory scheme relating to big game license fees which imposes substantial burdens (financial and otherwise) on non-resident hunters but not on resident hunters, which cannot be reasonably justified on any cost basis, can nevertheless survive a constitutional challenge on the basis that political support of the local citizenry for the big game management program in Montana may evaporate in the absence of discrimination against non-resident hunters.

Dated this 7th day of October, 1976.

GOETZ & MADDEN

By _____
JAMES H. GOETZ
P. O. Box 1322
Bozeman, Montana 59715
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument was served upon the following counsel by depositing same in the United States mail in postage prepaid envelopes addressed as follows:

Clayton R. Herron
Attorney at Law
P. O. Box 783
Helena, Montana 59601

Chapman, Duff & Lenzine
Attorneys at Law
1709 New York Avenue, N.W.
Washington, D.C. 20006

Sherman Lohn
Attorney at Law
199 West Pine
P. O. Box 1287
Missoula, Montana 59801

Dated this 7th day of October, 1976.

JAMES H. GOETZ

United States of America
District of Montana ____ } SS

I, the undersigned, Clerk of the United States District Court for the District of Montana, do hereby certify that the annexed and foregoing is a true and full copy of an original document on file in my office as such Clerk.

Witness my hand and Seal of said Court this 14th day of October 1976

-2-

JOHN E. PEDERSON
Clerk

By Doreen F. Kingo
Deputy Clerk,

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1150

LESTER BALDWIN, RICHARD CARLSON, JEROME J. HUSEBY, DAVID R. LEE, and DONALD J. MORIS,

Appellants,

—v.—

FISH AND GAME COMMISSION OF THE STATE OF MONTANA; WESLEY WOODGERD, Director of the Department of Fish and Game of the State of Montana; ARTHUR HAGENSTON; WILLIS B. JONES; JOSEPH J. KLABUNDE; W. LESLIE PENGELLY; and ARNOLD REIDER, Commissioners of the Fish and Game Commission of the State of Montana,

Appellees.

ON APPEAL FROM THE U. S. DISTRICT COURT
DISTRICT OF MONTANA
BUTTE DIVISION

FILED OCTOBER 12, 1976

PROBABLE JURISDICTION NOTED FEBRUARY 22, 1977

I N D E X

PAGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

* *

MONTANA OUTFITTERS ACTION GROUP, et al., Plaintiffs, -vs- FISH & GAME COMMISSION OF THE STATE OF MONTANA; et al., Defendants.	)	No. 75-80-BU

DOCKET ENTRIES IN DISTRICT COURT

DATE	NR.	PROCEEDINGS
6-23-75	1	Filed Civil Cover Sheet
6-23-75	2	Filed Complaint; w/request for 3 judge court and for injunctive relief, issued summons, handed original, 7 copies, 7-U.S. Marshal 285 forms to U.S. Marshal, Butte.
7-8-75	3	Filed summons with U.S. Marshal returns, all parties served June 24-July 7-1975.
7-10-75	4	Filed ANSWER of defts w/ cert. of service.
7-15-75	5	Filed Request of Pltfs. for Admission of Fact, w/cert. of service.

DATE	NR.	PROCEEDINGS
7-15-75	6	Filed Pltff's Interrog. to Defendants, w/cert. of service.
7-25-75	7	Filed Notice of Request for Statutory Three-Judge Court by Pltffs, w/cert. of mailing.
7-25-75		Del. File to Judge Murray in re request for 3 Judge Court. RET: ✓
7-30-75	8	Filed Order of Chief Judge Russell E. Smith, certifying that this case is a proper one for a 3-Judge Fed. Court & Chief Judge of Circuit is requested to constitute such a court. Mailed copies to Counsel of record (3) and certified copy to Richard H. Chambers, Chief Judge, USCA, 9th Cir., San Francisco.
8-5-75	9	Filed Order of Chief Judge, Ninth Circuit, appointing a Three Judge Court consisting of: Hon. James R. Browning, US Circuit Judge, 9th Cir.; Hon. Russell E. Smith and Hon. Wm. J. Jameson, US Dist. Judges, Dist. of Mont. Copies mailed to counsel of record.

DATE	NR.	PROCEEDINGS
8-7-75	10	Filed Defendants Response to Request for Admissions of Fact; w/cert. of service.
8-12-75	11	Filed Defts' Answers to Interrogatories w/cert. of Serv. thereon.
8-26-75	12	Filed Order, PT Conf set for Sept. 12, 1975, at Butte. Held. Mailed copies to counsel of record (3). Mailed copy to Judge Smith, Misso.
8-28-75		Mailed copies of entire case file to Judges Jameson & Browning.
9-11-75	13	Filed Pltff's Add'l Interrog. to Defendants, w/cert. of service.
9-12-75		Entire case file to Missla. Taken by Law Clerk. RET: 9-17-75.
9-17-75	14	Filed Prelim. PT Order; req. for adm. & prod. of doc. by 9-25-75; Depositions to be taken by 11-1-75; PT Attys conf. on or before 11-10-75; all discovery closed as of 11-1-75; copies of all experts to be exchanged; PT Order due 11-20-75, & in re

DATE	NR.	PROCEEDINGS
		exhibits, with except of X-rays, Ct. expects exhibits intended to be used to be filed with PT Order; Ans. & Obj. to all discovery requests shall be filed w/in time allowed by law; Motions to compel discovery shall be filed w/in 10 da. aft. obj. are made or refusals given & may be supported by brief as necessary; if brief is filed, opposing party shall have 5 da. to reply; discovery matters will be submitted without oral argument. Mailed copies to counsel of record on 9-18-75 (3).
9-30-75	15	Filed Order extending time to file & serve Requests for Admis. & Interrogs until 10-3-75. Mailed copies to counsel (3).
10-1-75		Mailed copies of documents #10 through 15, incl., to Judges Browning & Jameson.
10-6-75	16	Filed Deft's. Request for Admissions; w/cert. of mailing thereon; mailed copy to Judges Browning & Jameson.

DATE	NR.	PROCEEDINGS
10-6-75	17	Filed Interrogatories to Plaintiffs; w/cert. of mailing thereon; mailed copy to Judges Browning & Jameson.
10-14-75	18	Filed Deft's. Answers to Additional Interrogatories; w/cert. of mailing thereon. Mailed copy to Judges Browning & Jameson.
10-15-75	19	Filed Deposition of Wesley Woodgerd
10-20-75	20	Filed Notice of Taking Depositions, mailed copies to Judges Browning & Jameson, on Oct. 28 & 29 at Helena, Mt. w/cert. of service.
10-23-75	21	Filed Motion of Plaintiffs for Order Compelling Discovery & Memorandum in Support, w/cert. of service. Mailed copies to Judges Browning & Jameson.
10-23-75		Lodged proposed Order requiring party to ans. Interrog. Mailed Motion (Doc. # 2k) & proposed Order to Judge Smith, Msla.

DATE	NR.	PROCEEDINGS
10-29-75		Case file to RES, Msla, 11-11-75
11-3-75	22	Filed Motion of International Association of Game, Fish & Conservation Commissioners for leave to appear as Amicus Curiae. Lodged proposed Order. Mailed Motion & proposed Order to Judge Smith at Great Falls.
11-10-75		Entered Order, case is set for Hearing at Msla., MT., on 11-11-75 at 1:30 P.M. Parties notified by Judge Smith's Law Clerk. (This case had previously been set for hearing by Judge Smith at Great Falls on 11-10-75).
11-6-75	23	Filed Pltfs' Answer to Request for Admissions; w/ cert. of service thereon.
11-10-75		Mailed copies of document #23 to Judges Browning & Jameson.
11-10-75	24	Filed Order that The International Association of Game, Fish & Conservation Commissioners is hereby

DATE	NR.	PROCEEDINGS
		granted leave to appear in this Court as Amicus Curiae by filing a brief Amicus Curiae with this Court at an appropriate stage of this proceeding in support of its interest in this cause. Said Association may apply to this Court for leave to further appear in this cause circumstances may deem appropriate. Mailed copies to counsel of record (3) and copies to Judges Browning and Jameson.
11-10-75		Mailed documents 22, 23 & 24 to Judge Smith, Msla. to be placed in case file.
11-11-75	25	Filed Plaintiffs' Answers to Interrogatories of Defendants. Mailed Orig. Document to Judge Smith, Msla. to be placed in case file.
11-13-75	26	Filed Order that pltfs. will supply defts w/report of Melinda Schaill by 11-21-75; defts have until 12-10-75 to depose M. Schaill; defts. have until

DATE	NR.	PROCEEDINGS
		12-1-75 to supply pltfs. w/names of witnesses they intend to call; pltfs have until 12-10-75 to depose those witnesses & any persons quoted in deposition of William Long; parties shall submit proposed affidavits by 12-10-75 and prior to 12-20-75 advised opponent whether affidavits will be stipulated admissible; parties to hold p.t. conf. before 12-20-75 & will on that date submit a P.T. Order in conformity w/Rule 11; evidentiary hearing will be held on 12-29-75, 9:30 a.m., Msla and P.T. Order to stipulate that one judge may preside over such hearing. Mailed copies to counsel of record (3) and Judges Browning & Jameson.
11-20-75	27	Filed Deposition of Don L. Brown.
11-20-75	28	Filed Deposition of Orville Lewis.

DATE	NR.	PROCEEDINGS
11-20-75	29	Filed Deposition of Bill Long.
11-24-75	30	Filed Defts' Supplemental Responses to Pltffs' Interrogatories.
11-25-75		Mailed copies of document #30 to Judges Browning & Jameson.
12-17-75	31	Filed Deposition of Malinda Schaill, Ph.D.
12-22-75		Mailed case file to Missoula for hearing. RETURNED: ✓
12-23-75		Issued 10 Sub. to testify, behalf of defendant.
12-23-75	32	Filed Deposition of Michael D. Copeland. Mailed to Msla. to be placed in file.
12-24-75	33	Filed Pre-trial Order. Judge Smith's secretary mailed copy to Judge Jameson and notified parties that we must have another copy, Rule 21. (Took to Msla. for hearing).
12-29-75		Mailed copy of P.T. Order to Judge Browning.
12-29-75	34	Filed Defts' Memorandum for Evidentiary Hearing.
12-29-75		Ent. rec. of proc. - Trial 1 day. Parties stip. that

DATE	NR.	PROCEEDINGS
		proc. be heard 1 Judge only; Ct. leaves pltfs' case open for purpose of establ. pltfs standing; pltfs. asked leave to depose Minn. pltfs, upon defts' obj. rul. res; Deft. moved to dism. Compl. & pltfs' case, Ct. res. rul. until motions can be argued before 3-Judge Ct.
12-30-75		Ent. rec. of proc. - Trial 1 day. Parties stip. to Answ. by plfts. to Interrog. re. number of members in Mont. Outfitters Action Group be entered as evidence.
12-31-75		Ent. rec. of proc. - Trial 2 hrs. Defts. renewed Mos. to Dismiss, rul. res. for 3-Judge panel; evidence closed w/exception of named pltfs, which persons to be deposed in Helena by 1-23-76; parties directed to order transcript and counsel allowed use of copies, costs to be shared equally; parties shall, by 3-1-76, present briefs simult. and

DATE	NR.	PROCEEDINGS
		reply briefs by 3-15-76. Hearing set before 3-Judge Ct. 3-29-76, 10:00 a.m., Blgs and matter to be finally submitted that date.
12-31-75	35	Filed Notice of Hearing before Three-Judge Court 3-29-76, 10:00 a.m., Billings. Mailed copies to counsel (4); Clerk, G.F. & Blgs., U.S.M., Blgs., Judges Smith, Jameson and Browning.
12-31-75		Delivered File and Exhibits to T. Canaan, Ct. Reporter. RET'D: 8/20/76.
1-6-76	36	Filed Notice of Depositions of David R. Lee and Donald J. Moris, at 1:30 P.M. on 1-16-76 in Helena, MT., w/cert. of service thereon.
1-13-76		Mailed copies of document 36 to Judges Browning, Smith and Jameson. Mailed Orig. document to Judge Smith to be put in case file.
2-12-76	37	Filed Motion of Mont. Outfitters & Guides Association for leave to appear as Amicus Curiae, w/cert. of

DATE	NR.	PROCEEDINGS
		mailing.
2-12-76	38	Filed ORDER, Montana Outfitters & Guides Association is granted leave to appear as Amicus Curiae by filing Brief Amicus Curiae with this Court, said brief to be filed & served on or before Mar. 1, 1976; said Association may apply to Court for leave to further appear in this cause as circumstances may deen appropriate. Mailed copies to counsel and also counsel for Mont. Outfitters & Guides Assoc. (6). By telephone call to firm of Garlington, Lohn & Robinson requested 2 additional copies of Motion filed this date for Judges Browning & Jameson.
2-19-76		Mailed copies of Motion of Mont. Outfitters & Guides Assn. for leave to appear as Amicus Curiae to Judges Browning & Jameson.
2-24-76	39	Filed Deposition of Donald J. Moris.

DATE	NR.	PROCEEDINGS
2-25-76	40	Filed Deposition of David R. Lee.
3-2-76	41	Filed Original and 3 copies of Brief of Montana Outfitters & Guides Association, Amicus Curiae.
3-3-76	42	Filed Original and 2 copies of Brief of Plaintiffs; w/cert. of service thereon.
3-3-76	43	Filed Original and 2 copies of Brief of Amicus Curiae International Association of Game, Fish & Conservation Commissioners; w/cert. of service thereon.
3-5-76	44	Filed Original and 2 copies of Defts' Post-Hearing Brief; w/cert. of mailing thereon.
3-8-76	45	Filed copy of Garlington, Lohn & Robinson's letter to Lynn G. Foster in re postponement of present discovery schedule.
3-8-76		Copy of document #44 mailed to Judge Jameson by Judge Smith's Secretary.
3-8-76		Mailed documents 41 through 45 to Judge Smith, Msla. to be placed in case file.
3-9-76		Mailed copies of documents

DATE	NR.	PROCEEDINGS
		41 through 44 to Judge Browning; San Francisco.
3-9-76		Mailed copies of documents 41 through 43 to Judge Jameson; Billings.
3-17-76	46	Filed Reply Brief of Plaintiffs, w/cert. of service. Mailed copies to Judges Browning and Jameson.
3-17-76	47	Filed Defendants' Reply Brief, w/cert of servcice. Mailed copies to Judges Browning & Jameson.
3-17-76		Mailed documents Nos. 46 & 47 to Judge Smith for case file.
3-29-76		Entered Record of Hearing before 3 Judge Court, Judges, Browning, Smith & Jameson, at Billings, Mt.; Deft. moved to dismiss; deft. moved for entry of judgment in favor of deft. after argument of counsel, matter taken under advisement.
7-1-76	48	Filed court reporter's steno notes dated 12/29/75 (T. Canaan)
7-1-76	49	Filed court reporter's steno notes date 3/1/76 (T. Canaan)

DATE	NR.	PROCEEDINGS
8-12-76	50	Filed Opinion ordering judgment be entered denying pltfs. all relief w/dissenting opinion of Judge Browning attached and certificate of Judge Smith that Judge Jameson concurs. Mailed copies to counsel of record (6) and Judges Browning and Jameson. Opinion also overrules all of the State's Objections to introduction of evidence, which were reserved. Judgment/Order Book, Vol. 10, pg. 399.
8-12-76	51	Filed and entered Judgment on Decision by the Court that pltfs are denied all relief. Mailed copies to counsel of record (6) and Judges Browning and Jameson. Judgment/Order Book, Vol. 10, pg. 415.
8-20-76	52	Filed Transcript of Evidentiary Hearing, Vol. I, II, III.
9-17-76		Released Tr. of Evidentiary Hearing to James Goetz, for period of 1 week. Returned:

DATE	NR.	PROCEEDINGS
		9-28-76.
10-8-76	53	Filed Notice of Appeal by Montana Outfitters Group, Lester Baldwin, Richard Carlson, Jerome J. Huseby, David R. Lee, Donald J. Moris, Plaintiffs, to Supreme Court of the United States.
10-14-76		Mailed certified copies to Clerk, Supreme Court of U. S., Wash. DC and to James Goetz, counsel for Pltff; mailed copies to remaining counsel including counsel for amicus curiae. Total copies 8.
10-20-76		By telephone advised counsel for Appellant that Bond on Appeal is required.
11-3-76	54	Filed letter setting forth title of case in U.S. Supreme Court and referring to request by pltfs. to proceed in forma pauperis.
10-26-76	55	Filed the Appellees' designation of record on appeal.
3-4-77	56	Filed Cert. copy of ORDER of Supreme Court of US noting probable jurisdiction

DATE	NR.	PROCEEDINGS
		in this case. (Supreme Court will further direct Clerk of US Dist. Court when record is to be transmitted to Sup. Court.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

* * * * * * * * * * * * * * * * * * *

MONTANA OUTFITTERS ACTION GROUP, LESTER BALDWIN, RICHARD CARLSON, JEROME J. HUSEBY, DAVID R. LEE, and DONALD J. MORIS,	)	
Plaintiffs,	)	No.
-vs-	)	75-80-BU
FISH AND GAME COMMISSION OF THE STATE OF MONTANA; WESLEY WOODGERD, Director of the Department of Fish and Game of the State of Montana; ARTHUR HAGENSTON; WILLIS B. JONES; JOSEPH J. KLABUNDE; W. LESLIE PENGELLY; and ARNOLD RIEDER, Commissioners of the Fish and Game Commission of the State of Montana,	)	
Defendants.	)	

COMPLAINT

COME NOW the Plaintiffs in the above-entitled action and allege as follows:

1. This is a proceeding for a preliminary and permanent injunction, and a declaratory judgment, restraining the enforcement, operation, and execution of Section 26-202.1, Revised Codes of Montana (1947), effective March 5, 1973, and of Section 26-202.1, Revised Codes of Montana (1947), as amended by Sentate Bill No. 236, effective May 1, 1976, as violative of Article IV, Section 2,

and the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution.

2. JURISDICTION:

Jurisdiction of this Court is invoked under 28 U.S.C., §1343, this being a suit in equity authorized by law, 42 U.S.C. §1983, to be commenced by any citizen of the United States or other person within the jurisdiction thereof to redress the deprivation under color of statute, ordinance, regulation, custom or usage of a state of rights, privileges, and immunities secured by the Constitution and Laws of the United States. The rights, privileges and immunities sought herein to be redressed are those secured by Article IV, Section 2, and the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution.

Jurisdiction is further invoked under 28 U.S.C. §2281, this being a suit for preliminary and permanent injunction restraining the enforcement and execution of Section 26-202.1, Revised Codes of Montana (1947), effective March 5, 1973, and of Section 26-202.1, Revised Codes of Montana (1947, as amended by Senate Bill No. 236, effective May 1, 1976, and requiring the convening of a three (3) Judge Federal Court.

Jurisdiction is further invoked under

28 U.S.C. §§2201 and 2202, this being a suit for a declaratory judgment, declaring the unconstitutionality of Section 26-202.1, Revised Codes of Montana (1947) effective March 5, 1973, and of Section 26-202.1, Revised Codes of Montana (1947), as amended by Senate Bill No. 236, effective May 1, 1976.

3. Plaintiff, Montana Outfitters Action Group, whose address is Harrison, Montana, is an unincorporated organization comprised of outfitters, hunting guides, hunters, fishermen, and outdoor sportsmen. There are approximately fourteen (14) members of Plaintiff organization, approximately seven (7) whom are professional, licensed hunting guides; individual members of Plaintiff organization hunt and guide in the State of Montana, particularly in the southwestern part of Montana, primarily in Beaverhead, Madison, and Gallatin Counties; some of the individual members of the Plaintiff organization are non-residents and therefore must pay a non-resident-related fee to the State of Montana for a license to hunt within the State of Montana, the members of Plaintiff organization who are licensed are dependent in such guiding business almost wholly on non-resident clientele. Individual members of Plaintiff organization are each adversely

affected by the discriminatory, high fees established and enforced for non-resident hunters by the Defendants; because of such discriminatory, high non-resident fees, the businesses of individual outfitters who are members of Plaintiff organization have and will continue to be adversely affected.

4. Plaintiff, Lester Baldwin, is an outfitter licensed to operate as a hunting guide in the State of Montana. His address is P. O. Box 118, Melrose, Montana. He was licensed by the State of Montana in 1969 and has earned a substantial part of his livelihood ever since as a professional outfitter. His clientele is almost wholly non-resident and they hunt almost solely for elk. He guides primarily in Madison and Gallatin Counties; his business has been, and continues to be, adversely affected by the discriminatory practices of Defendants hereinafter complained of.

5. Plaintiff, Richard Carlson, is a resident of St. Paul, Minnesota, who has hunted in Montana primarily for elk by archery during the years 1969-1974; Plaintiff, Jerome J. Huseby, is a resident of St. Paul, Minnesota, who has hunted in Montana primarily for elk by archery during the years 1969-1972, and 1974; both Plaintiffs, Carlson and Huseby, have hunted for deer in addition to elk,

primarily for the reason that, in order to hunt elk, they had to buy a combination non-resident license which also included deer; Plaintiff, David R. Lee, is a resident of Maplewood, Minnesota, who has hunted in Montana only for elk, by rifle and by archery, during the years 1969-1974; Plaintiff Lee was required to purchase a combination license in each of these years in order to hunt only elk; Plaintiff, Donald J. Moris, is a resident of Lake Elmo, Minnesota, who has hunted only elk by archery in 1969, and 1970, and bighorn sheep by rifle in 1974; in each of these years, Plaintiff Moris was required to purchase a combination license even though he hunted only elk two years and bighorn sheep in the other year.

6. Defendant, the Fish and Game Commission of the State of Montana (hereinafter Commission), was created by Section 82A-2004, Revised Codes of Montana (1947), for the welfare of the fish, game and wildlife of the State of Montana. The commission is the department head of the Department of Fish and Game of the State of Montana, Revised Codes of Montana (1947), Section 82A-2001. Its five (5) members are appointed by the Governor of the State of Montana, and are responsible for enforcement and

implementation of Section 82A-2001, et seq., Revised Codes of Montana (1947).

7. Defendant, Wesley Woodgerd, is the Director of the Department of Fish and Game of the State of Montana, by statute (Revised Codes of Montana, 1947, Section 82A-2003), and as such is the chief administrative officer responsible for the enforcement and implementation of said statute.

8. Defendants, Arthur Hagenston, Willis B. Jones, Joseph J. Klabunde, W. Leslie Pengelly, and Arnold Rieder, are members of the Fish and Game Commission of the State of Montana.

9. Each and all of the acts of the Defendants alleged herein were done by defendants and each of them under the color and pretense of the statutes, ordinances, regulations, customs and usages of the State of Montana, and under the authority of their offices or color of their offices as Director of the Department of Fish and Game of the State of Montana, and as members of the Fish and Game Commission of the State of Montana.

10. Revised Codes of Montana (1947), Section 26-202.1, Licenses--fees--classifications of licenses--fees and powers under licenses, effective March 5, 1973, requires licensing fees that differentiate between residents and non-residents of the State of Montana. Specific licenses must be obtained

in order to hunt specific kinds of game. In order to "pursue, hunt, shoot, and kill" one (1) deer, a resident must purchase a "Class A-3" license for a fee of Three Dollars ($3.00); an elk, a "Class A-5" license for a fee of Three Dollars ($3.00); a black or brown bear, a "Class A-6" license for a fee of Five Dollars ($5.00). In order to purchase any of these licenses, a resident must first have purchased a "Conservation License" for a fee of One Dollar ($1.00).

Non-residents must purchase a "Class B-2" combination license for a fee of One Hundred Fifty Dollars ($150.00), in order to hunt game animals in designated areas. A non-resident who wishes to hunt only deer may do so by purchasing a "Class B-5" license for Thirty-five Dollars ($35.00). As a condition of purchasing any license, the non-resident must first have purchased a "Conservation License" for a fee of One Dollar ($1.00).

Therefore, if a non-resident hunter wishes to be entitled to kill one (1) deer, the licensing fees are Thirty-six Dollars ($36.00), compared to Four and 00/100 Dollars ($4.00) for a resident.

And, if a non-resident hunter wishes to hunt elk or bear, he is required to purchase a "Class B-2" combination license for

One Hundred Fifty Dollars ($150.00) plus One Dollar ($1.00) for a Convervation License. Separate licenses for elk and bear are not available to the non-resident hunter. He must purchase the combination license to be permitted to hunt either elk or bear, and to hunt bear, he must purchase an additional special license for Thirty-five Dollars ($35.00).

Thus, the fee schedules may be summarized as follows:

	RESIDENT	NON-RESIDENT	RATIO
One deer	$4.00	$36.00	9:1
One elk	$4.00	$151.00	37:1
One bear	$6.00	$186.00	31:1
One of each	$12.00	$186.00	15:1

11. Revised Codes of Montana (1947), Section 26-202.1, as amended by Senate Bill No. 236, effective May 1, 1976, also differentiates between residents and non-residents. Residents are still permitted to purchase individual deer, elk and bear licenses, costing Six Dollars ($6.00), Eight Dollars ($8.00) and Six Dollars ($6.00), respectively. The conservation license is still a prerequisite. Copy of S.B.No. 236, attached hereto.

In order for a non-resident to purchase most individual game animal licenses, he must first purchase a "Class B-2" combination license for a fee of Fifty Dollars ($50.00),

and a conservation license. However, he may purchase an individual deer license, "Class B-5" for Fifty Dollars ($50.00) entitling him to kill one (1) deer, without purchasing a "Class B-2" license.

But, in order to hunt elk, a non-resident must purchase a "Class B-10 Non-resident Big Game Combination License", for a fee of Two Hundred Twenty-five and 00/100 Dollars ($225.00). This fee includes the required conservation license and entitles him to hunt one (1) deer, elk, and one (1) bear. To hunt only bear, a non-resident must purchase a "Class B-2" combination license, a conservation license, and a special license for bear, for Fifty Dollars ($50.00).

Thus, the fee schedules as of May 1, 1976, may be summarized as follows:

	RESIDENT	NON-RESIDENT	RATIO
One deer	$7.00	$51.00	7:1
One elk	$9.00	$225.00	25:1
One bear	$7.00	$101.00	14:1
One of each	$21.00	$225.00	11:1

12. The statutes herein challenged require licensing fees that differentiate between residents and non-residents in order to hunt any and all types of game.

13. The statutes herein challenged require non-residents to purchase combination licenses as a prerequisite to hunting certain

types of game, while imposing no such requirement on residents. The effect of requiring a combination license is the imposition of significantly higher hunting fees on non-residents.

14. The statutes requiring a differential between resident and non-resident licensing fees of the magnitude and type complained of, have, in fact, no rational basis.

15. The statutes herein challenged deprive Plaintiffs of rights, privileges, and immunities guaranteed by Article IV, Section 2, and the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §1983.

16. By reason of the Laws, policies and practices herein complained of, Plaintiffs have suffered and will continue to suffer immediate irreparable injury. Plaintiffs have no adequate or available remedy other than this action for a declaratory judgment and injunctive relief.

WHEREFORE, Plaintiffs pray that the Court, as may appear proper, and convenient:

1. Issue a preliminary injunction enjoining the Defendants, their agents, and those persons acting in concert with them from enforcing the complained of provisions of Section 26-202.1, Revised Codes of Montana

(1947), effective March 5, 1973, and Section 26-202.1, Revised Codes of Montana (1947, as amended by Senate Bill No. 236, effective May 1, 1976, or otherwise denying Plaintiffs their rights secured by Article IV, Section 2 and the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution.

2. Convene a three (3) Judge District Court, as required by 28 U.S.C. §§2281 and 2284.

3. Enter a judgment or decree declaring that the complained of provisions of Section 26-202.1, Revised Codes of Montana (1947, effective March 5, 1973, and Section 26-202.1. Revised Codes of Montana (1947). as amended by Senate Bill No. 236, effective May 1, 1976, are void as repugnant to Article IV, Section 2 and the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution.

4. Permanently enjoin the Defendants, their agents, employees, successors, and all persons acting in concert and participating with them from enforcing the complained of provisions of the statutes referred to hereinabove, or otherwise denying Plaintiffs their rights secured by Article IV, Section 2 and the Due Process and Equal Protection clauses of the Fourteenth Amendment of the

United States Constitution.

5. Grant the non-resident Plaintiffs the equitable remedy of reimbursement for fees already paid as required by the complained of differential fees, subject to the right of the State of Montana to collect reasonable additional fees from the non-resident hunters which are reasonably related to the additional costs of enforcement of the State Fish and Game laws and of contribution to conservation programs.

6. Allow Plaintiffs their costs herein, attorney's fees, and grant such other and further felief as it may deem proper.

Dated this 20th day of June, 1975.

/s/ James H. Goetz

JAMES H. GOETZ
15 South Tracy, Suite 8
Bozeman, Montana 59715
Attorney for Plaintiffs

UNITED STATES OF AMERICA)
ss.
State of Montana)

I, FRANK MURRAY, Secretary of State of the State of Montana, do hereby certify that the following is a true and correct copy of SENATE BILL NO. 236, Chapter No. 546, Montana Session Laws of 1975, enacted by the Forty-fourth Legislature of the State of Montana, approved by Thomas L. Judge, Governor of said State, on the thirteenth day of May, 1975, and effective May 1, 1976.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the great Seal of said State.

Done at the City of Helena, the Capital of said State, this sixteenth day of May, 1975.

/s/ Frank Murray
Frank Murray
Secretary of State

. . . . . .

CHAPTER NO. 546

MONTANA SESSION LAWS 1975

SENATE BILL NO. 236

AN ACT TO AMEND SECTION 26-202.1, R.C.M. 1947, TO PROVIDE A FEE INCREASE IN THE RESIDENT AND NONRESIDENT HUNTING LICENSES;

TO CHANGE THE CLASS B-2 NONRESIDENT BIG GAME LICENSE TO CLASS B-2 NONRESIDENT COMBINATION BIRD AND FISH LICENSE AND MAKE IT A PREREQUISITE TO PURCHASE HUNTING TAGS; TO PROVIDE FOR CLASSIFICATION OF NONRESIDENT DEER TAGS; TO PROVIDE FOR B-10 NONRESIDENT BIG GAME COMBINATION LICENSES SOLD IN A LICENSE YEAR; TO LIMIT THE TOTAL NUMBER OF NONRESIDENT BIG GAME COMBINATION LICENSES SOLD IN A LICENSE YEAR; TO INCLUDE THE NONRESIDENT CONSERVATION LICENSE AS PART OF THE CLASS B-2 LICENSE AND THE RESIDENT CONSERVATION LICENSE AS PART OF THE CLASS AAA LICENSE; TO GIVE THE COMMISSION AUTHORITY TO LIMIT THE NUMBER OF LICENSES SOLD IN DESIGNATED HUNTING DISTRICTS; TO PROVIDE A FEE FOR SPECIAL ELK AND DEER DRAWINGS; TO PROVIDE FOR A SPECIAL NONGAME CERTIFICATE; AND TO PROVIDE A DELAYED EFFECTIVE DATE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 26-202.1, R.C.M. 1947, is amended to read as follows:

"26-202.1. Licenses -- fees -- classifications of licenses -- fees and powers under licenses. (1) Class A License--Resident Fishing License. Any resident as defined by section 26-202.3, upon payment of a fee of five dollars ($5) shall receive a Class A license which shall entitle

the holder thereof to fish with hook and line or rod as authorized by regulations of the commission.

(2) Class A-1 license--Resident Game Bird License. Except as herein provided, any resident as defined by section 26-202.3, who is twelve (12) years of age or older, may, upon payment of a fee of four dollars ($4) receive a Class A-1 license, which will entitle the holder to pursue, hunt, shoot and kill game birds and possess the dead bodies of game birds which are so authorized by regulations of the commission.

(a) No hunting licenses shall be issued to any resident person under the age of eighteen (18) years unless he presents to the person authorized to issue such license a certificate of competency as provided by this section.

The department of fish and game shall provide for a course of instruction in the safe handling of firearms and for the purpose may cooperate with any reputable association or organization having as one of its objectives the promotion of safety in the handling of firearms. The department may designate any person found by it to be competent to give instructions in the handling of firearms. A person so appointed shall give such course of instruction and upon the successful completion thereof

shall issue to the person instructed a certificate of competency in the safe handling of firearms.

(3) Class A-2 License--Special Bow and Arrow License. A holder of any one of the following: a Class A-3, A-4, A-5, B-2, B-5, B-6, B-7, B-8, or B-10 license, may upon payment of an additional sum of six dollars ($6) to any agent of the fish and game commission authorized to issue fishing and hunting licenses be entitled to a Class A-2 license, which shall authorize the holder thereof to pursue, hunt, shoot, and kill the game animals authorized by the licenses held with bow and arrow and to possess these carcasses during special seasons, and in special areas, as may be designated by the fish and game commission.

(4) Class A-3, A-4, A-5, A-6 Licenses. Any resident as defined by section 26-202.3 who is twelve (12) years of age or older, may upon payment of the proper fee or fees be entitled to purchase one each of the following licenses: Class A-3, Deer A Tag, six dollars ($6)(for the license year beginning May 1, 1976), and seven dollars ($7) for each license year thereafter; Class A-4, Deer B Tag, twelve dollars ($12); Class A-5 Elk Tag, eight dollars ($8); Class A-6, Black or Brown Bear Tag, six dollars ($6); which will entitle the holder to pursue, hunt,

shoot, and kill the game animal or animals authorized by the license held and to possess the dead bodies of game animals of the state which are so authorized by the regulation of the commission.

(5) Class B License--Nonresident Fishing License. Any person not a resident as defined in section 26-202.3, upon payment of the sum of twenty dollars ($20) to any agent of the fish and game commission authorized to issue fishing and hunting licenses, shall be entitled to a Class B license, which shall entitle the holder thereof to fish with hook and line as authorized by the rules and regulations of the commission.

(6) Class B-1 License--Nonresident Game Bird License. Except as herein provided, any person not a resident as defined in section 26-202.3, but who is twelve (12) years of age or older, upon payment of the sum of thirty dollars ($30) to any agent of the fish and game commission authorized to issue fishing and hunting licenses shall be entitled to a Class B-1 license, which shall entitle the holder thereof to pursue, hunt, shoot, kill and possess game birds as authorized by the rules and regulations of the commission.

No hunting licenses shall be issued to

any nonresident person under the age of eighteen (18) years unless he presents to the person authorized to issue such license a certificate of competency as provided in section 26-202.1(2)(a) or a certificate verifying that he has successfully completed a course in the safe handling of firearms in any state or province.

(7) Class B-2 License--Nonresident Combination License. Within the limitations of this section or any commission rule, any person not a resident as defined in section 26-202.3, but who is twelve (12) years of age or older, upon the payment of fifty dollars ($50) may apply to the fish and game office, Helena, Montana for a Class B-2 license, and nonresident conservation license as prescribed in section 26-230, which shall authorize the holder to pursue, hunt, shoot, kill and possess game birds, and to fish with hook and line as authorized by the rules and regulations of the commission, and to purchase additional and special licenses and tags as provided by law or commission regulation.

(8) Class B-3 License--Temporary Nonresident or Tourist Fishing License. Any person not a resident as defined in section 26-202.3, upon payment of the sum of ten dollars ($10) to any agent of the fish and

game commission authorized to issue fishing and hunting licenses, shall be entitled to a temporary nonresident fishing license, which shall authorize the holder to fish with hook and line as authorized by the rules and regulations of the fish and game commission for a period of six (6) days inclusive of the dates indicated on the license.

(9) Class B-5 License--Nonresident Deer License. Any person not a resident as defined in section 26-202.3, but who is twelve (12) years of age or older and a holder of a nonresident conservation license, upon the payment of the sum of fifty dollars ($50) shall be entitled to a Class B-5 license which shall authorize the holder to pursue, hunt, shoot, and kill one (1) deer in the area or areas designated in the license, as determined by the commission, and to possess the carcass of same.

(10) Class B-6 License--Nonresident Antelope License. Any person not a resident as defined in section 26-202.3, but who is twelve (12) years of age or older and a holder of a Class B-2 nonresident combination license, upon the payment of the sum of fifty dollars ($50) shall be entitled to a Class B-6 license which shall authorize the holder to pursue, hunt, shoot, and kill one (1) antelope in the area designated in the

license, as determined by the commission, and to possess the carcass of same.

(11) Class B-7 and B-8 Licenses. Any person not a resident as defined in section 26-202.3, but who is twelve (12) years of age or older, and is a holder of a B-2 nonresident combination license, may upon payment of the proper fee or fees and subject to the limitations prescribed by law and commission regulation be entitled to apply to the Fish and Game Office, Helena, Montana, to purchase one each of the following licenses: Class B-7, Deer A Tag, fifty dollars ($50); Class B-8, Deer B Tag, fifty dollars ($50); and will entitle the holder to pursue, hunt, shoot, and kill the game animal or animals authorized by the license held and to possess the dead bodies of game animals of the state which are so authorized by the regulations of the commission.

(12) B-10 nonresident big game combination license. Any person not a resident as defined in section 26-202.3, R.C.M., 1947, but who is twelve (12) years of age or older may, upon payment of the proper fee or fees and subject to the limitations prescribed by law and commission regulation, be entitled to apply to the fish and game office, Helena, Montana, to purchase a B-10 nonresident big game combination license for two hundred

twenty-five dollars ($225) which shall entitle the holder to all the privileges of a B-2 nonresident combination license, a deer A tag, and elk tag and a black bear license. This license includes the nonresident conservation license as prescribed in section 26-230, R.C.M. 1947.

(13) Special licenses. Any applicant who is twelve (12) years of age or older and is a resident as defined by section 26-202.3, or any applicant who is the holder of a Class B-2 nonresident combination license may apply for a special license, which in the judgment of the fish and game commission, is to be issued and shall pay the following fees therefor:

Moose, resident twenty-five dollars ($25), nonresident one hundred twenty-five dollars ($125);

Mountain Goat, resident fifteen dollars ($15), nonresident seventy-five dollars ($75);

Mountain Sheep, resident twenty-five dollars ($25), nonresident one hundred twenty-five dollars ($125);

Antelope, resident five dollars ($5);

Grizzly Bear, resident twenty-five dollars ($25), nonresident one hundred twenty-five dollars ($125);

Black or brown bear, nonresident fifty dollars ($50).

In the event a holder of a valid special grizzly bear license kills a grizzly bear, he must purchase a trophy license for a fee of twenty-five dollars ($25) within ten (10) days after date of kill. Such trophy license shall authorize the holder to possess and transport said trophy.

In the event that the number of valid resident applications for licenses exceeds the number of licenses which the fish and game commission desires to issue in any hunting district, then the number of licenses issued to nonresident license holders in that hunting district shall not exceed ten per cent (10%) of the total issued.

(14) Class C License--Trapper's License. Any resident as defined in section 26-202.3, upon making application and paying the sum of ten dollars ($10) to the fish and game commission, shall be entitled to a trapper's license, which shall authorize the holder thereof to trap fur-bearing animals, within the state of Montana at such times and in such manner as may be lawful so to do under the laws of the state, and the regulations of the fish and game commission, and at such places as may be designated in said license.

(15) Class C-1 License--Landowner's Trapping License. Any owner or tenant, or

member of the immediate family of said owner or tenant, upon making application to the fish and game commission, and upon payment of the sum of one dollar ($1) shall be entitled to a landowner's trapping license which shall entitle the holder thereof to trap any fur-bearing animal, except beaver, on land owned or leased by him, or his immediate family, at such times and in such manner as may be lawful so to do under the laws of the state and the regulations of the fish and game commission and at such places as may be designated in said licenses.

(16) Exception. (a) A resident under the definition of section 26-202.3, who is sixty-two (62) years or older shall be entitled to fish and hunt game birds with a pioneer license issued by the state fish and game commission for a fee of fifteen cents ($.15). The form of such license shall be prescribed by the fish and game commission.

(b) Residents of all institutions under the jurisdiction of the state board of institutions, except the Montana state prison at Deer Lodge, will be entitled to fish without a license. Such residents shall carry a permit on a form prescribed by the commission and signed by the superintendent of the institution in lieu of a license.

(c) A veteran who is a patient residing at a hospital operated by the veterans

administration, within or outside the state, may fish with a license issued by the head of the hospital on forms prescribed and furnished by the commission. The fee for such license shall be fifteen cents ($.15).

(d) If a person is convicted of a violation of the fish and game laws or regulations of Montana, the privilege conferred by this subsection shall be revoked for not less than six (6) months.

(e) Residents, as defined by section 26-202.3, under the age of fifteen (15) years may purchase Class A-1, A-3, and A-5 licenses at two dollars ($2) per license.

(f) The commission, by rule or regulation, may prescribe the number of Class B-5 and B-6, B-7, B-8, or B-10 licenses to be issued in each of the hunting districts designated by it. Any license sold may be restricted to a specific hunting area and may specify the species, age, and sex to be taken in order to insure the proper management and propagation of game animals in these areas, provided, however, that no number limit shall be placed on B-7, B-8 and B-10 license by area except in major hunter concentration areas as determined by the commission. Not more than seventeen thousand (17,000) nonresident big game combination licenses (B-10) may be sold in any one license year.

(g) Special antelope licenses. In the event the number of valid applications for special antelope licenses for a hunting district exceeds the quota set by the commission for the district, such licenses shall be awarded by a drawing. Persons making valid application who did not receive an antelope license during the season immediately preceding the drawing shall be given first preference in such drawing for first, second and third choice hunting districts. The commission shall have the authority to promulgate such rules and regulations as are necessary to implement this subsection.

(17) Only one (1) license of any one (1) class, except Class B-3 and B-4 licenses, shall be issued to any one (1) person, provided, however, that the commission may prescribe rules and regulations for the issuance or sale of a replacement license of the same class in the event the original license is lost, stolen or destroyed upon payment of the sum of one dollar ($1).

(18) Class AAA License--Sportsman's License. Any resident, as defined by section 26-202.3, who is twelve (12) years of age or older, upon payment of the sum of thirty-five dollars ($35) shall be entitled to a sportsman's license which shall permit

the holder to exercise all rights granted to holders of Class A, A-1, A-3, A-5, A-6 and resident conservation licenses as prescribed in section 26-230. The commission shall furnish each holder of a sportsman's license an appropriate decal.

(19) Class D-1 License--Nonresident Mountain Lion License. Any person not a resident as defined in section 26-202.3, but who is twelve (12) years of age or older and a holder of a nonresident Class B-2 combination license, upon payment of the sum of twenty-five dollars ($25) to any agent of the fish and game commission authorized to issue fishing and hunting licenses shall be entitled to a Class D-1 license, which shall entitle the holder thereof to pursue, hunt, shoot, kill and possess mountain lion as authorized by the rules and regulations of the commission.

(20) Class D-2 License--Resident Mountain Lion License. Any person who is a resident as defined in section 26-202.3, and who is twelve (12) years of age or older, upon payment of the sum of five dollars ($5) to any agent of the fish and game commission authorized to issue fishing and hunting licenses shall be entitled to a Class D-2 license, which shall entitle the holder thereof to pursue, hunt, shoot, kill and possess mountain lion as authorized by the rules and

regulations of the commission.

(21) Special elk or deer licenses. (a) Any person who is the holder of a valid resident elk license or a Class B-10 nonresident big game combination license may apply for a special elk license upon payment of a fee of one dollar ($1).

(b) Any person who is the holder of a valid resident deer license or any nonresident who holds a Class B-2 license and a valid deer tag may apply for a special deer license upon payment of a fee of one dollar ($1).

(c) The commission shall have the authority to promulgate such rules and regulations as are necessary to implement this subsection.

Section 2. There is a new R.C.M. section numbered 26-202.7 that reads as follows:

26-202.7. Special elk permits -- power of commission. (1) The commission may: (a) provide for the refund of resident elk tag license fees to persons applying for special elk permits in hunting districts where there is no general elk hunting, and may set time limits and describe area restrictions;

(b) designate special elk permit areas where priority will be given to applicants who have not held special elk permits for a period of years to be determined by the

commission.

(2) The commission may adopt rules necessary to implement this section.

Section 3. There is a new R.C.M. section numbered 26-202.8 that reads as follows:

26-202.8. Nongame certificate. (1) In order to promote the preservation and management of nongame wildlife within the state, the commission may issue a nongame certificate or window decal indicating that the holders of the certificates are supporting the natural resource interests of the state of Montana.

(2) The form of the certificates or window decals shall be determined by the commission and the inscription upon it shall indicate that no hunting, fishing or trapping privilege is thereby conferred.

(3) These certificates shall be sold for an annual fee of five dollars ($5).

(4) The proceeds collected from the sale of the certificates shall be deposited in the fish and game fund and be expended for the management, preservation, and propagation of all species of nongame wildlife in the state of Montana.

Section 4. This act shall be effective May 1, 1976.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BUTTE DIVISION

* * * * * * * * * * * * * * * * * * * *

MONTANA OUTFITTERS ACTION GROUP, LESTER BALDWIN, RICHARD CARLSON, JEROME J. HUSEBY, DAVID R. LEE, and DONALD J. MORIS, Plaintiffs, -vs- FISH AND GAME COMMISSION OF THE STATE OF MONTANA; WESLEY WOODGERD, Director of the Department of Fish and Game of the State of Montana; ARTHUR HAGENSTON; WILLIS B. JONES; JOSEPH J. KLABUNDE; W. LESLIE PENGELLY; and ARNOLD RIEDER, Commissioners of the Fish and Game Commission of the State of Montana, Defendants.	Civil No. 75-80-BU

ANSWER

Come now the Defendants FISH AND GAME COMMISSION OF THE STATE OF MONTANA; WESLEY WOODGERD, Director of the Department of Fish and Game of the State of Montana; ARTHUR HAGENSTON; WILLIS B. JONES; JOSEPH J. KLABUNDE; W. LESLIE PENGELLY; and ARNOLD RIEDER, Commissioners of the Fish and Game Commission of the State of Montana, and state their answer to the Complaint on file herein as follows:

FIRST DEFENSE

Defendants move to dismiss the complaint

of plaintiff, Montana Outfitters Action Group, upon the grounds that:

A. The complaint fails to state a claim against these defendants upon which relief can be granted to the said plaintiff.

B. The said plaintiff has no capacity to sue or to be a party herein or to obtain relief prayed for in the complaint.

C. This court has no jurisdiction over cause purported to be alleged by this plaintiff.

SECOND DEFENSE

Defendants move to dismiss the complaint of plaintiff, Lester Baldwin, upon the grounds that:

A. The complaint fails to state a claim against these defendants upon which relief can be granted to the said plaintiff.

B. This court has no jurisdiction over cause purported to be alleged by this plaintiff.

THIRD DEFENSE

Defendants move to dismiss the complaint of plaintiff, Richard Carlson, upon the grounds that:

A. The Complaint fails to state a claim against these defendants upon which relief can be granted to the said plaintiff.

B. This court has no jurisdiction over cause purported to be alleged by this plaintiff.

FOURTH DEFENSE

Defendants move to dismiss the complaint of plaintiff, Jerome J. Huseby, upon the grounds that:

A. The complaint fails to state a claim against these defendants upon which relief can be granted to the said plaintiff.

B. This court has no jurisdiction over cause purported to be alleged by this plaintiff.

FIFTH DEFENSE

Defendants move to dismiss the complaint of plaintiff, David R. Lee, upon the grounds that:

A. The complaint fails to state a claim against these defendants upon which relier can be granted to said plaintiff.

B. This court has no jurisdiction over cause purported to be alleged by this plaintiff.

SIXTH DEFENSE

Defendants move to dismiss the complaint of plaintiff, Donald J. Moris, upon the grounds that:

A. The complaint fails to state a claim against these defendants upon which relief can be granted to said plaintiff.

B. This court has no jurisdiction over cause purported to be alleged by this plaintiff.

SEVENTH DEFENSE

The State of Montana is an indispensable party defendant.

EIGHTH DEFENSE

Any issues, questions or claims to relief relating to the law and statutes of the State of Montana as the same were in force and effect during the period beginning March 5, 1973 and ending on date of the filing of complaint herein are moot and subject to no reimbursement or declaration as to validity herein because, in addition to other defenses set forth herein, the defenses are alleged hereunder:

A. That as allegations are stated in complaint, no case or controversy arises; and

B. If the fees, as alleged, were paid they were paid voluntarily; and

C. Issues as to injunction are moot.

NINTH DEFENSE

The court has no jurisdiction to grant the relief prayed for in paragraph 5 of the complaint, or any thereof, under the allegations of this complaint or otherwise.

TENTH DEFENSE

Section 26-202.1, Revised Codes of Montana (1947), as amended by Senate Bill No. 236 is not in force and effect as of time of filing of complaint herein.

ELEVENTH DEFENSE

Defendants deny that in any event plaintiffs' attorneys' costs and fees are justified or lawful herein.

TWELFTH DEFENSE

Defendants deny and admit as follows:

A. Defendants deny the allegations of paragraphs 1 and 2 of the complaint.

B. Defendants admit that the Montana Outfitters Action Group is an unincorporated organization; but, otherwise, defendants deny the allegations of paragraph 3 of the complaint.

C. Deny the allegations of paragraphs 4 and 5 of said complaint.

D. Admit the allegations of paragraphs 6, 7, and 8 of the said complaint.

E. Deny allegations of paragraph 9 of said complaint.

F. Deny the allegations of paragraphs 10 to 16, inclusive of said complaint.

THIRTEENTH DEFENSE

That the complaint does not allege matters sufficient to constitute a cause for injunction or declaratory relief.

WHEREFORE these defendants pray that the complaint of each and all parties plaintiff herein be dismissed; that plaintiffs be denied the relief prayed for in the complaint and all thereof; that no injunction issue herein; and for decree sustaining

validity of the statutes of the state of Montana insofar as the same are attacked by complaint on file herein; and for such further relief to defendants as the court may deem proper in the premises.

Dated this 9th day of July, 1975.

ROBERT WOODAHL, Attorney General, State of Montana

CLAYTON R. HERRON
Special Assistant Attorney General
307 Horsky Block
P. O. Box 783
Helena, Montana 59601

By /s/ CLAYTON R. HERRON
Attorneys for Defendants.

I, CLAYTON R. HERRON, one of the attorneys for the defendants in the above entitled action, hereby certifies that on this 9th day of July, 1975, I served a true copy of the foregoing "Answer" upon attorney of record for plaintiffs, by depositing a copy in the United States mail, postpaid, addressed to JAMES H. GOETZ, 15 South Tracy, Suite 8, Bozeman, Montana 59715.

/s/ CLAYTON R. HERRON
CLAYTON R. HERRON

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

* *

MONTANA OUTFITTERS ACTION GROUP, et al.,
Plaintiffs,
-vs-
FISH AND GAME COMMISSION OF THE STATE OF MONTANA, et al.,
Defendants.

CIVIL NO. 75-80-BU

PRE-TRIAL ORDER

* * *

AGREED FACTS

The following facts are true and require no proof:

1. Section 26-202.1, Revised Codes of Montana (1947), Licenses--fees--classifications of licenses--fees and powers under licenses, effective March 5, 1973, requires higher licensing fees for non-resident hunters than for resident hunters in the State of Montana.

2. Licensing fee for non-resident hunters is higher than that for resident hunters in the State of Montana for each and every type of game license, except for bow-hunting and wild turkey, under the provisions of Section 26-202.1, Revised Codes of Montana (1947).

3. Under Section 26-202.1, Revised Codes

of Montana (1947), effective March 5, 1973, in order for a resident to "pursue, hunt, shoot, and kill" one (1) deer, he or she must purchase a "Class A-3" license for Three Dollars ($3.00); one (1) elk, a "Class A-5" license for Three Dollars ($3.00); and a black or brown bear, a "Class A-6" license for Five Dollars ($5.00).

4. A resident hunter must purchase for One Dollar ($1.00), a conservation license before purchasing any tags of licenses for specific game, except in those cases in which the resident hunter purchases a "sportsmen's license."

5. A non-resident hunter must purchase a "Class B-5" license for Thirty-five Dollars ($35.00) in order to "pursue, hunt, shoot, and kill" one (1) deer, under the provisions of Section 26-202.1, Revised Codes of Montana (1947), effective March 5, 1973. A non-resident hunter may also hunt deer with purchase of a non-resident "combination license" ("B-2").

6. A non-resident hunter must have purchased a conservation license for One Dollar ($1.00) before purchasing any tags or licenses for specific game.

7. A non-resident hunter must purchase a "Class B-2" non-resident big game license, for One Hundred Fifty Dollars ($150.00) in order to hunt any and all big game animals,

except deer and antelope, under the provisions of Section 26-202.1, Revised Codes of Montana (1947), effective March 5, 1973, except that an additional exception exists under Section 26-202.5, Revised Codes of Montana (1947), for "spring bear."

8. In order to hunt elk or bear (with the exception of "spring bear"), a non-resident must purchase a "Class B-2" license and a conservation license, under the provisions of Section 26-202.1, Revised Codes of Montana (1947), effective March 5, 1973.

9. Section 26-202.1, Revised Codes of Montana (1947), as amended by the 1975 Montana Legislature (effective May 1, 1976) also differentiates between resident and non-resident hunters.

10. Under Section 26-202.1, Revised Codes of Montana (1947) (effective May 1, 1976), residents will still be permitted to purchase individual deer, elk, and bear licenses, costing Six Dollars ($6.00), Eight Dollars ($8.00), and Six Dollars ($6.00), respectively. A second deer tag can be purchased by a resident under such law for a Twelve Dollar ($12.00) fee.

11. The purchase of a conservation license for One Dollar ($1.00) is still a prerequisite to the purchase of any

individual tags or licenses by the resident hunter pursuant to Section 26-202.1, Revised Codes of Montana (1947), as amended, effective May 1, 1976.

12. Under Section 26-202.1, Revised Codes of Montana (1947), as amended, effective May 1, 1976, in order for a non-resident to purchase most individual game licenses, he or she must first purchase a "Class B-2" combination license (which includes a conservation license) for a fee of Fifty Dollars ($50.00).

13. A non-resident hunter may purchase an individual deer license, "Class B-5", for Fifty Dollars ($50.00), pursuant to Section 26-202.1, Revised Codes of Montana (1947), as amended, effective May 1, 1976, entitling the non-resident hunter to kill one (1) deer, without purchasing a "Class B-2" license.

14. In order to hunt elk, a non-resident hunter must purchase a "Class B-10 Non-Resident Big Game Combination License", for a fee of Two Hundred Twenty-five Dollars ($225.00), under the provisions of Section 26-202.1, Revised Codes of Montana (1947), as amended, effective May 1, 1976.

15. A "Class B-10 Non-Resident Big Game Combination License", provided for by Section 26-202.1, Revised Codes of Montana

(1947), as amended, effective May 1, 1976, entitled a non-resident to hunt one (1) deer, one (1) elk, and one (1) bear. Such license also includes the right to fish in Montana and hunt birds.

16. In order to hunt only bear, a non-resident must purchase a "Class B-2" combination license, a conservation license, and a special license for bear, for a total of One Hundred Dollars ($100.00), under Section 26-202.1, Revised Codes of Montana (1947), as amended, effective May 1, 1976.

17. The area within the boundaries of the State of Montana is approximately 147,150 square miles.

18. The amount of permanent water surface within such area averages approximately 1,400 square miles and the remainder being land surface in the amount of approximately 145,750 square miles.

19. In total area, Montana ranks fourth of all the states of the United States.

20. The population of Montana in 1972 was approximately 716,000.

21. Of the fifty states in the United States, Montana ranks forty-second or lower in population and has been of the same, or approximately the same, in rank since statehood.

22. In the period from the year 1960 to 1970, the number of Montana residents hunting

within the State of Montana increased by approximately sixty-seven percent (67%) as compared with an increase of approximately five hundred thirty percent (530%) in the number of non-resident hunters within the state.

23. Per capita income for Montana residents ranks thirty-fourth in the United States for the year 1974.

24. In 1974, the average per capita income for residents of Montana was Four Thousand Seven Hundred Seventy-six Dollars ($4,776.00).

25. Approximately thirty percent (30%) of the land in Montana is federal land.

26. Approximately seventy-five percent (75%) of the elk taken in Montana by hunters are killed on federal land.

27. Approximately eighty-five percent (85%) of the bear taken in Montana by hunters are killed on federal land.

28. A significant portion of elk habitat in the State of Montana is on federal land.

* * *

Dated this 19th day of December, 1975.

/s/ James H. Goetz

JAMES H. GOETZ
Goetz & Madden
P. O. Box 1322
Bozeman, Montana 59715
Attorneys for Plaintiffs

/s/ Clayton R. Herron
CLAYTON R. HERRON
P. O. Box 783
Horsky Block
Helena, Montana 59601
Attorney for Defendants

Dated this 23rd day of December, 1976.

/s/ Russell E. Smith
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

* * * * * * * * * * * * * * * * * * * *

MONTANA OUTFITTERS ACTION GROUP, et al., Plaintiffs, -vs- FISH AND GAME COMMISSION OF THE STATE OF MONTANA; et al., Defendants.	)	CV 75-80-BU

OPINION

Before: BROWNING, Circuit Judge, and SMITH and JAMESON, District Judges

PER CURIAM:

This case is about elk and the rights of nonresidents to hunt them.[1] The elk, once a plains animal, now lives in the mountains in central and western Montana. The elk is migratory in the sense that it moves from the summer range to the winter range and back, and when this sort of migration occurs near the borders of Montana, the elk drift to and from Montana, Idaho, Wyoming, and Canada. The summer range is in the

---

[1] While there are disparities in the price of resident and nonresident fees for other fish and game licenses, only the combination license which permits the nonresident to hunt elk is drawn into controversy here.

mountains, and a significant part of it is federally owned. The winter range is in the foothills and valleys, a significant part of which is in private ownership. About 75% of the elk killed are killed on federal lands. The elk is not and never will be hunted commercially, It is an animal much sought for its trophy value, and nonresident hunters are as a group more interested in the trophy than are the resident hunters as a group. In recent years there has been an increase in the number of hunters and a disproportionate increase in the number of nonresident hunters. In the years between 1960 and 1970 there was an increase of 536% in nonresident hunting as compared with an increase of 67% in resident hunting.[2] The preservation of the elk depends upon conservation.

R.C.M., 1947 § 26-202.1(12) provides for a nonresident big game combination license and fixes the fee therefor. A nonresident may not hunt elk without the combination license. The license fee for the 1976 hunting season will be $225.00, and for that

---

[2]All of the State's objections to the introduction of evidence, which were reserved, are now overruled.

fee the nonresident is permitted to take one elk, one deer, one black bear, upland birds, and fish. A resident[3] will be able to hunt elk in 1976 by the payment of $8.00 for an elk tag[4] and $1.00 for a conservation license.[5]

While a resident is not required to buy any combination of licenses, the cost to him of all of the privileges granted by the nonresident combination license would be $30.00.[6]

---

[3]R.C.M. 1947 § 26-202.3(2) provides:

"Any person who has been a resident of the state of Montana, as defined in section 83-303, for a period of six (6) months immediately prior to making application for said license shall be eligible to receive a resident hunting or fishing license."

R.C.M. 1947 § 83-303 provides:

"Every person has, in law, a residence. In determining the place of residence the following rules are to be observed:

1. It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose...."

[4]R.C.M. 1947 § 26-202.1(4).

[5]R.C.M. 1947 § 26-230.

[6]R.C.M. 1947 § 26-202.1 (1), (2), and (4), and R.C.M. 1947 § 26-230.

The ratio is, therefor, 7.5 to 1 in favor of the resident. The claim is that these licensing provisions are discriminatory and in violation of the privileges and immunities clause (art. IV, § 2) and the equal protection and due process clauses (amend. XIV) of the United States Constitution. Plaintiffs concede that the State may constitutionally charge nonresidents more for hunting and fishing privileges than residents because residents, through taxes other than hunting and fishing license fees, contribute to the wildlife management program, but urge that the degree of the disparity cannot be justified on a cost basis. While no records are kept which precisely disclose the direct and indirect costs which properly may be apportioned between residents and nonresidents, the plaintiffs did offer the opinion evidence of an economist to the effect that a ratio of no more than 2.5 to 1 can be justified costwise. On a consideration of that evidence, the State's evidence opposing it, and with due regard to the presumption of constitutionality, we find that the ratio of 7.5 to 1 cannot be justified on any basis of cost

allocation.[7]

Defendants challenge the plaintiffs' standing. The plaintiffs Moris and Lee are nonresidents who have hunted for elk in Montana in the past and who want to hunt in Montana in the future. They are obviously adversely affected by an increase in nonresident license fees and have standing to maintain this action. The economic interests of Moris and Lee are affected, and that is sufficient. Sierra Club v. Morton, 405 U.S. 727 (1972). Since all issues are presented by Moris and Lee, we do not pass upon the

---

[7] For a nonresident who wanted to hunt and hunted elk, and elk alone, the ratio is 28.2 to 1. Some part of the difference between the 28.2 to 1 and the 7.5 to 1 ratios may be justified by arguments made in support of the combination license, but, in view of our determination that the fee discrimination at a 7.5 to 1 ratio is not justified costwise, we approach the legal problems involved without resolving the arguments pro and con as to whether the discrimination caused by the combination license is justified.

standing of the remaining plaintiffs.[8]

Defendants suggest that there is no justiciable controversy because the law governing the 1976 hunting season will not be effective until July 1, 1976; the 1975 hunting season is over, and the law governing it cannot affect the plaintiffs.[9] The problems here raised are those which are "'capable of repetition, yet evading

---

[8]The plaintiffs are four nonresident hunters, one licensed outfitter, and the Montana Outfitters Action Group, composed of seven licensed outfitters and seven dude ranchers and nonresident hunters. Amicus curiae briefs supporting the validity of the statute were filed by the Montana Outfitters and Guides Association, representing 123 outfitters, and by the International Association of Game, Fish and Conservation Commissioners, representing the wildlife agencies of all 50 states, Canada, Puerto Rico, and Mexico.

[9]While we do not consider the law governing the 1975 hunting season (R.C.M. 1947 §26-202.1) as it existed prior to the 1975 amendments (Laws of Montana 1975, ch. 91, § 1, ch. 417, § 1, ch. 546, § 1) we do note that the arguments now addressed to R.C.M. 1947 §26-202.1 as it now exists are equally applicable, except perhaps in degree, to the prior law.

review.'" Roe v. Wade, 410 U.S. 113, 125 (1973). Had plaintiffs waited until July 1, 1976, to commence this action, it is unlikely that a resolution at this court level would be obtained until the 1976 hunting season was over. Absent a repeal of the challenged law, unlikely since the Montana legislature will not meet until January 1977, the plaintiffs will be affected by the present law, and there is now a controversy. We hold the controversy to be justiciable.

The State argues with some support in the authorities that the State owns the animals in their wild state in trust for the beneficial use of the citizens of the State, and that the State may do what it will with its own property.[10] The

---

[10]The cases of Geer v. Connecticut, 161 U.S. 519 (1896); McCready v. Virginia, 94 U.S. 391 (1876); In re Eberle, 98 F. 295 (N.D.Ill. 1899), and some language in Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928), lend support to this view. Because of the involvement of elk with the lands of the sovereign United States, the ownership analysis is not as readily applicable to elk as it might be to the Chinese pheasant.

plaintiffs contend with some support in the authorities that "[t]he whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource."[11] We do not here choose between the theories advanced. The State under either theory has the power to manage and conserve the elk, and to that end to make such laws and regulations as are necessary to protect and preserve it.

Whether, in that management, a discrimination between residents and nonresidents is permissible requires an examination of the claimed right, the State purpose

---

[11]The quotation is from Toomer v. Witsell, 334 U.S. 385, 402 (1948). In Missouri v. Holland, 252 U.S. 416, 434 (1920), Mr. Justice Holmes said, "To put the claim of the State upon title is to lean upon a slender reed." This language was quoted with approval in Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948), and in Toomer v. Witsell, supra. All of the cases cited in this footnote were concerned with migrating fish and birds. The movement of the elk is more a drifting than a true migration.

involved, and the justifications for the discrimination.

We turn to the nature of the right asserted by the plaintiffs in this case. Not everyone may hunt elk. There are too many people and too few elk. If the elk is to survive as a species, the game herds must be managed, and a vital part of the management is the limitation of the annual kill. That limitation may be accomplished in many ways, but all of them involve in some degree a limitation upon hunter days.[12] The hunter days may be controlled by pricing the license, by conducting lotteries, by limiting the length of the seasons, and by restricting the area of the hunt. Any controlling device, by reason of its effect upon the life circumstances of a potential hunter, may deprive that hunter of any possibility of hunting elk.

Whatever word may be used to describe plaintiffs' asserted rights -- right, privilege, chance -- the asserted right

---

[12]Each day that one hunter is in the field is a hunter day.

is recreational in character,[13] and except for a few residents who live in exactly the right place, is expensive recreation. Critically examined, the right asserted here is, therefore, no more than a chance to engage temporarily in a recreational activity in a sister state, and even the chance is dependent upon the willingness of the people of the sister State to manage the subject matter of the recreation -- the elk. The asserted right is not fundamental[14] and is not protected as a privilege and immunity by art. IV, § 2 of the United States Constitution. United States v. Wheeler, 254 U.S. 281

---

[13]We believe that this is sufficient to distinguish this case from Takahashi v. Fish and Game Comm'n, supra; Toomer v. Witsell, supra; and Mullaney v. Anderson, 342 U.S. 415 (1952), all of which were concerned with the fundamental right to pursue a calling or business. In American Commuters Ass'n, Inc. v. Levitt, 279 F. Supp. 40 (S.D.N.Y. 1967), aff'd, 405 F.2d 1148 (2d Cir. 1969), the district court expressly distinguished between noncommercial fishing licenses and "commercial fishing rights involving interstate commerce." 279 F. Supp. at 48.

[14]See Black v. McClung, infra, at 248.

(1920); Canadian Northern Ry. v. Eggen, 252 U.S. 553 (1920); and Blake v. McClung, 172 U.S. 239 (1898).

We cannot ignore the nature of the right involved in treating the equal protection problem. If the needs for education at the primary level[15] and at the college level[16] do not create the fundamental sort of rights which have constitutional protection under the equal protection clause, then certainly the asserted right in this case does not have a constitutional basis and is not fundamental for equal protection purposes. There is simply no nexus between the right to hunt for sport and the right to speak, the right to vote, the right to travel, the right to pursue a calling. We are not, therefore, required to scrutinize the discrimination strictly but only to determine whether the system bears some rational relationship to legitimate State purposes.[17]

---

[15]San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

[16]Sturgis v. Washington, 368 F.Supp. 38 (W.D. Wash. 1973), aff'd, 414 U.S. 1057 (1973).

[17]San Antonio Independent School District v. Rodriguez, supra; Hughes v. Alexandria Scrap Corp., ___U.S.___, 44 U.S.L.W. 4959.

The State purpose is to restrict the number of hunter days. Any regulatory system which imposes a license fee in some sense discriminates against those who can't afford to pay it. As the fee increases, the discrimination increases. A regulatory scheme based upon a pure lottery in which a limited number of hunters were chosen would be discrimination-free, but a legislature might with some rationality[18] conclude that a pure lottery open to all potential elk hunters in the United States might destroy the political motivation to Montana citizens to underwrite the elk management program in the absence of which the species

---

[18]If the conclusion is rational, the presumption of constitutionality would require us to consider it.

would disappear.[19]

We conclude that where the opportunity to enjoy a recreational activity is created or supported by a state, where there is no nexus between the activity and any fundamental right, and where by its very nature the activity can be enjoyed by only a

---

[19]Were a Montana resident's chances to hunt calculated purely on a population basis, Montana residents would get .34% of the elk licenses issued. On the basis of all elk licenses issued in 1973 (107,675), and the population in 1970 (Montana: 694,409; United States: 203,235,298), Montana residents would have received 366 of them (694,409 divided by 203,235,298, multiplied by 107,675). This figure is unrealistic because in any sort of a drawing allocating licenses, the proportion of applications from Montana to the population of Montana would exceed the proportion of applications from other states to the populations of those states. Montana residents can hunt more cheaply, and probably, because of their proximity to it, are more attracted by hunting. Even so, a legislature looking at the facts might conclude that some relatively small percentage of Montana hunters would be licensed if nonresidents and Montana residents were treated equally.

portion of those who would enjoy it, a state may prefer its residents over the residents of other states, or condition the enjoyment of the nonresident upon such terms as it sees fit.[20]

DATED this 11th day of August, 1976.

---

[20]The results reached in the cases of Geer v. Connecticut, supra, n. 10; McCready v. Virginia, supra, n. 10; In re Eberle, supra, n. 10; and State v. Kemp, 73 S.D. 458, 44 N.W. 2d 214 (1950), appeal dismissed for want of a substantial federal question, 340 U.S. 923 (1951), are in accord with the result reached here.

United States Government

MEMORANDUM

TO: CLERK OF COURT - Butte

COPIES: JUDGES BROWNING and JAMESON

FROM: JUDGE SMITH

DATE: August 11, 1976

SUBJECT: Montana Outfitters v. Fish and Game Comm'n - CV 75-80-BU

I certify that Judge Jameson concurs with me in the attached per curiam. Please file it with Judge Browning's dissent attached.

/s/ Russell E. Smith
Russell E. Smith
United States District Judge

MONTANA OUTFITTERS ACTION GROUP v. FISH AND GAME COMMISSION - No. 75-80-BU

BROWNING, Circuit Judge, dissenting:

The majority recognizes that the "ownership theory" espoused in early Supreme Court opinions is denigrated in more recent pronouncements. See Toomer v. Witsell, 334 U.S. 385, 402 (1948). Also in disrepute is the "special public interest" theory occasionally advanced to justify state discrimination in favor of its own citizens in matters of "privilege" as distinguished from "right." See Sugarman v. Dougall, 413 U.S. 634, 643-45 (1975); Graham v. Richardson, 403 U.S. 365, 372-74 (1970). All that remains is the traditional Equal Protection issue: Does the higher license fee charged nonresidents for hunting elk in the state serve a legitimate state purpose?

The contention most strongly pressed by the state is that the difference in license fee serves the legitimate purpose of imposing upon nonresidents a fair share of the cost of maintaining the elk herd. As the majority finds, however, "the ratio of 7.5 to 1 [or 28.2 to 1] cannot be justified on any basis of cost allocation." The majority does not discuss the other purposes advanced by the state to support the discrimination -- implying (and I agree) that there is no

reasonable relationship between the discriminatory license fee and any of the other purposes advanced by the state. Each such justification is shown by the record to be either logically or factually unsupportable.

The majority nonetheless sustains the discrimination on a novel theory not suggested by the state or supported by any authority.*

---

*The majority states (note 20) that the result reached in this case is in accord with the results reached in Greer v. Connecticut, 161 U.S. 519 (1896); McCready v. Virginia, 94 U.S. 396 (1876); In re Eberle, 98 Fed. 295 (N.D. Ill. 1899); and State v. Kemp, 73 S.D. 458, 44 N.W. 2d 214 (1950), appeal dismissed for want of a substantial federal question 340 U.S. 923 (1951). As the majority notes (note 10), the first three cases rest on the "ownership theory," rejected in subsequent decisions, and, in any event, not readily applicable to elk, 75% of which are killed on federal lands. Dismissal by the Supreme Court of the appeal in State v. Kemp did not involve a ruling that the discrimination was constitutional. The statement filed in the Supreme Court in opposition to jurisdiction pointed out that violations of state statutes not claimed to be unconstitutional had occurred that were sufficient to sustain the conviction.

The ultimate state interest relied upon by the majority is the unquestionably legitimate and important one of conservation. The asserted relationship between the discriminatory license fee and conservation is not direct. The state employs discrimination, the majority suggests, to further conservation in an indirect and, in my opinion, impermissible way.

The majority holds the discrimination against nonresidents to be justified because the state might rationally conclude that if nonresidents were not discriminated against and thereby discouraged from participating in the elk hunt, the number of residents who could participate would be so small that the residents would be unwilling to maintain a vigorous conservation program. In short, an otherwise invidious discrimination against nonresidents is justified because the state may rationally consider the discrimination necessary to induce residents to support the state program required to conserve the herd.

In more general terms, the principle appears to be that the state may burden access by nonresidents to a finite local resource in order to increase the share available to residents and thereby maintain a political base within the state for

the support of state efforts to conserve the resource. Put in another way, a state may justify the constitutionality of a discriminatory statute by showing that political support by the class of people to be benefited by the discrimination is necessary in order to continue the program that benefits them.

I do not believe discrimination for such a purpose is permitted by the Equal Protection Clause.

Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974), involved a constitutional challenge to an Arizona statute requiring a year's residence as a condition to an indigent receiving non-emergency medical care at county expense. The state argued that "the requirement is necessary for public support" of modern and effective public medical facilities because the voters believed the requirement protected them from an influx of low-income families such facilities would otherwise attract. The Supreme Court rejected the argument, stating, "A State may not employ an invidious discrimination to sustain the political viability of its programs." 415 U.S. at 266.

The Supreme Court cited with approval Cole v. Housing Authority, 435 F. 2d 807, 812-13 (1st Cir. 1970), invalidating a

city's durational residency requirement for access to low-income housing projects. In Cole, the city argued that a durational residential requirement was "often the key to survival of [public] housing" because voters believed such a restriction to be necessary to avoid benefiting newcomers as against longtime residents. The Court of Appeals rejected this reasoning, stating, "The objective of achieving political support by discriminatory means . . . is not one which the constitution recognizes." 435 F. 2d at 813.

Memorial Hospital and Cole involved infringement of fundamental rights that could be justified only by a compelling state interest. But this does not make them inapplicable. These cases rejected justification of discrimination on political grounds because justification on such a basis is inherently inappropriate, not because the right infringed was fundamental.

A holding that discrimination by the state may be justified by showing that the state could rationally believe such discrimination was necessary to secure political support for a program in the public interest, would lead inevitably, if indirectly, to the conclusion that invidious discrimination can be justified by popular disapproval

of equal treatment. As the court said in Cole, such a rule "would rationalize discriminatory classifications which are constitutionally impermissible." 435 F. 2d at 812. Addressing essentially the same point in Memorial Hospital, the Supreme Court said: "'[p]erhaps Congress could induce wider state participation in school construction if it authorized the use of joint funds for the building of segregated schools,' but that purpose would not sustain such a scheme." 415 U.S. at 267, quoting Shapiro v. Thompson, 394 U.S. 618, 641 (1969).

The majority's rationale is at odds with the principle that constitutional rights are not subject to abrogation by majority will. As the Court said in West Virginia Board of Education v. Barnette, 319 U.S. 624, 638 (1942): "The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversies, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." See also Lucas v. Colorado General Assembly, 377 U.S. 713, 736 (1963).

The rule applied by the majority is impossible to limit. It would immunize even

the most arbitrary discrimination from constitutional attack whenever it could be contended reasonably that the discrimination was necessary to obtain political support for the state activity.

Access to outdoor recreation is increasingly important to our society. It is significant, for example, that the number of visitors to national and state parks doubled in the decade 1960-1970. U.S. Department of Commerce, Statistical History of the United States 1970. In fact if not in law, recreational resources constitute a vital national asset. The sentiment that state residents have a preferred claim to such resources within the state is unworthy of protection "under a Constitution which was written partly for the purpose of eradicating such provincialism." Cole v. Housing Authority, supra, 435 F. 2d at 813.

I would hold Montana's discriminatory license fee unconstitutional.

MONTANA OUTFITTERS ACTION GROUP, et al., Plaintiffs, -vs- FISH AND GAME COMMISSION OF THE STATE OF MONTANA, et al., Defendants.	)	Civil Action File No. CV-75-80-BU

JUDGMENT

This cause came on for hearing before the Court, Honorable JAMES R. BROWNING, RUSSELL E. SMITH, and WILLIAM J. JAMESON, Circuit Judge & United States District Judges, and the issues having been duly heard and a decision having been duly rendered.

It is Ordered and Adjudged that plaintiffs are denied all relief.

Dated at Butte, Montana, this 12th day of August, 1976.

JOHN E. PEDERSON
Clerk of Court

By /s/ Dora Lou Sevener
Deputy Clerk

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1976

No. [redacted] 76-1150

BALDWIN, et al., Appellants

v.

FISH AND GAME COMMISSION, et al., Appellees

MOTION TO AFFIRM
and
STATEMENT OPPOSING APPELLANTS' MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Of Counsel:

CLAYTON R. HERRON
P. O. Box 783
Helena, Montana 59601

PAUL A. LENZINI
CARL W. ULRICH
Chapman, Gadsby, Hannah and Duff
1700 Pennsylvania Avenue, N. W.
Washington, D. C. 20006

Counsel for Appellees

November 10, 1976

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1976

No. 76-5528

BALDWIN, et al.,

Appellants,

v.

FISH AND GAME COMMISSION, et al.,

Appellees.

MOTION TO AFFIRM

Appellees, Fish and Game Commission of the State of Montana, et al., pursuant to Rule 16 of the Supreme Court of the United States, move to affirm the judgment entered August 12, 1976, by the U. S. District Court for the District of Montana sitting as a Three-Judge Court pursuant to 28 U.S.C. § 2281, on the ground that the question presented by this appeal is so unsubstantial as not to require further argument. Concurrently herewith by separate pleading, Appellees also state their opposition to Appellants' Motion For Leave To Proceed In Forma Pauperis.

In their Jurisdictional Statement dated October 8, 1976, Appellants raise two questions as presented in this appeal. The first of these inquires whether comity among the several states will be maintained as a result of the District Court's decision. The second questions whether a state may favor its residents in order to assure the political support of its citizens for state programs. By such indirection Appellants disguise the issue. There is no Constitutional infirmity in the

-/-

CHAPMAN, GADSBY, HANNAH & DUFF
1700 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 223-9100

District Court's decision. The question answered in the affirmative by the District Court and now before this Court is whether differential treatment accorded non-residents by Montana in the challenged license scheme is a rational exercise of that State's broad trustee and police power to conserve, manage and protect its wildlife resource. 1/

The license scheme set forth in the challenged Montana statutes acts as a control device to limit the degree of hunter access to the state's wildlife resource. This access is measured in hunter days, 2/ and the control mechanism employed is that of establishing fees for the subject hunting licenses. The essential impact of the combination license requirement for non-residents to hunt elk, and of the underlying discrimination against non-residents for other challenged hunting licenses, is the imposition upon non-residents of an additional economic cost, intended to hold down the number of non-residents who pursue recreational hunting opportunities in Montana.

That this discriminates against non-residents is but a corrollary of the fact that any regulatory system which imposes a license fee in some sense discriminates against those who cannot afford to pay it. Opinion, p. 8. But for Montana to favor its residents in the protection and enjoyment of its wildlife resource cannot in itself be said to be

---

1/ The District Court recognized (Opinion, p. 6) that under either the "trust ownership" or "police power" theories, Montana has the power to manage and conserve its wildlife and to make laws in pursuance of that power. The court found it unnecessary to choose between these two theories, so that issue is not put before this Court on appeal. Kleppe v. New Mexico, ____U.S.____, 49 L. Ed. 2d 34 (1976), reaffirms both trusteeship and police power as sources of state authority, and holds only that a state's power to regulate the taking of wildlife on federal lands within its boundaries is subordinate to the power of the Federal Government under the Property Clause, and if federal sovereignty is threatened so as to occasion exercise of the Supremacy Clause, an inconsistent state law must yield. No issue of federal sovereignty is raised by this appeal.

2/ Each day that one hunter is in the field is a hunter day. See Opinion, p. 7.

CHAPMAN, GADSBY, HANNAH & DUFF
1700 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 223-9100

irrational or to impose an undue discrimination against non-residents. Having actively fostered an environment hospitable to big game populations, a state may prefer its own people in utilizing the bounties of nature within her borders. See Hughes v. Alexandria Scrap Corp., ____U. S. ____, 49 L. Ed. 2d 220, 231 (1976). Whether use of such a regulatory device constitutes permissible discrimination requires an examination of the right claimed, the state purpose involved, and the justification for the discrimination. Opinion, p. 6.

The purpose of Montana's challenged license scheme is to restrict the number of hunter days. Opinion, p. 8. The record clearly shows that the influx of non-resident hunters into Montana is one of several problems which, if unaddressed, would result in increased hunting pressure on the state's wildlife resource over that which is presently the case. Tr. 18-19, 237-238, 244-245. This results from several factors, one being that the elk, the object of the combination license, is much sought for its trophy value as well as its meat value. The District Court found that non-resident hunters as a group are more interested in the trophy than are resident hunters as a group. Opinion, p. 2. The District Court also found that in recent years there has been an increase in the number of hunters in Montana and a disproportionate five-fold increase in the number of non-resident hunters. 3/ The District Court aptly noted that, as to elk, there are too many people and too few elk. A vital part of the management of the elk and other wildlife populations is control of the annual harvest. That limitation may be accomplished in many ways, all of which involve to some degree a limitation upon hunter days. Opinion, p. 7. Thus the record demonstrates that non-resident hunting pressure poses a potential threat to which the Montana

3/ In the years between 1960 and 1970, Montana experienced an increase of 536% in non-resident hunting as compared with an increase of 67% in resident hunting. See Tr. 191, 250, 284, 291, 306.

CHAPMAN, GADSBY, HANNAH & DUFF
1700 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 223-9100

legislature was forced to respond, in conjunction with other complex problems of wildlife conservation faced by the state. See Tr. 13-14, 194, 243. The facts are thus not unlike those posed to this Court in State v. Kemp, 44 N. W. 2d 214 (S. D. 1950), dismissed for want of a substantial federal question, 340 U. S. 423 (1951). In that case the Supreme Court of the State of South Dakota held that non-residents posed a peculiar evil in respect to the state's management over hunting of migratory waterfowl and upheld a state statute which forbade non-residents from hunting migratory waterfowl in that state.

Also bearing on the reasonableness of residence as a permissible classification in this case is the District Court's recognition that residents of Montana have contributed to conservation programs which support wildlife populations and which form the basis for the recreational opportunity at issue and consequently the state may prefer its residents over those of other states. Opinion, p. 9. This is based on ample record evidence that residents, unlike non-residents, contribute directly and indirectly on a continuing basis to underwrite the viability of Montana's wildlife resource. Tr. 191, 284-286. Indeed, they provide the sine qua non for continuation of effective conservation efforts in the state directed at the overall environmental condition necessary for the survival of wildlife.

That a standard of judicial scrutiny based on rational relationship was properly applied by the District Court is so settled as to preclude further argument. 4/ Whatever legal characterization be applied to sport hunting, 5/ it is recreational in character and expensive recreation at that.

4/ San Antonio Independent School District v. Rodriquez, 411 U.S. 1 (1973); see Cox, Developments in the Law, Equal Protection, 82 Harv. L. Rev. 1065, 1082-1083 (1969).

5/ Whether the activity under scrutiny is styled a privilege or right is immaterial. In any event it is clear, notwithstanding the dissenting opinion of Judge Browning below, that such a distinction is neither relevant nor determinative in the District Court's per curiam opinion.

CHAPMAN, GADSBY, HANNAH & DUFF
1700 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 223-9100

Opinion, p. 7. As such it does not qualify as an activity to be accorded special protection under the Privileges and Immunities Clause, Art. IV, Sec. 2 of the United States Constitution. Appellants assert no deprivation of a fundamental right, such as the right to travel. See Memorial Hospital v. Maricopa County, 415 U.S. 270 (1974); Cole v. Housing Authority, 435 F.2d 807 (1st Cir. 1970) (cited in Jurisdictional Statement, p. 6). As stated by the District Court, "[t]here is simply no nexus between the right to hunt for sport and the right to speak, the right to vote, the right to travel, the right to pursue a calling." Opinion, p. 8. All related cases cited by Appellants deal with a non-resident's right to partake of a sister state's natural resources where commercial rather than recreational interests were involved. See, e.g., Toomer v. Witsell, 334 U.S. 385 (1948); Takahaski v. Fish and Game Com'n, 334 U.S. 410 (1948); Mullaney v. Anderson, 342 U.S. 415 (1952). This Court's discussion in Austin v. New Hampshire, 420 U.S. 646 (1975) reaffirms the settled understanding that the Privileges and Immunities Clause is applicable only when there is at issue a citizen's right to pursue commercial or occupational activities across state lines, or to partake in activities essential to his livelihood without special burdens imposed solely by reason of non-residence. In a decision handed down one year after this Court's seminal decision on the Privileges and Immunities Clause in Blake v. McClung, 172 U.S. 240, 248-249 (1898), the Circuit Court of Illinois flatly ~~reflected~~ rejected the assertion that sport hunting was a privilege protected by Article IV, Section 2 of the U.S. Constitution. In re Eberle, 98 F. 295 (C.C. Ill. 1899). 6/

6/ Because sport hunting is not a privilege protected by Article IV, Section 2, we find the present appeal unlike Commonwealth of Massachusetts v. Westcott, No. 75-1775, cert. granted October 4, 1976, 45 U.S.L.W. 3221, and Douglas v. Seacoast Products, Inc., No. 75-1255, probable jurisdiction noted April 26, 1976, 44 U.S.L.W. 3608. Those cases arise in the context of commercial fishing disputes and dealt with the interrelation between the Submerged Lands Act of 1953 and the Privileges and Immunities Clause, and the Equal Protection Clause, Amendment XIV of the U.S. Constitution, respectively, as interpreted in Toomer v. Witsell, supra.

CHAPMAN, GADSBY, HANNAH & DUFF
1700 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 223-9100

Where, as here, a rational relationship to a legitimate state interest is evident, and where the matter at issue is an economic exaction in furtherance of that legitimate interest, the Constitution does not require that the Montana statute be drawn to fit with precision the legitimate purposes animating the legislature. Hughes v. Alexandria Scrap Corp., supra, 49 L. Ed. 2d at 233; Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955). That the statute might have been drawn more artfully or that Montana might have employed the mathematical exactitude inherent in the application of cost allocation principles is also irrelevant. See Opinion, pp. 8-9, see also Lindsley v. Natural Carbonic Gas, 220 U.S. 61 (1911). As a result, no substantial issues of equal protection are before this Court.

Despite this fact, Appellants argue that Montana's license scheme threatens comity between the states and forbodes retaliatory measures among them. That assertion will not create jurisdiction for this appeal where there is an absence of constitutional infirmity. In any event, there is no record evidence to support Appellants' speculations. Indeed, the International Association of Game, Fish and Conservation Commissioners, representing the fish and wildlife agencies of all fifty states, filed a brief amicus curiae with the District Court in support of Montana's authority to impose the subject license fee differential. Moreover, unlike the commuter income tax addressed in Austin v. New Hampshire, supra, the Montana fee structure adopts a long established nationwide practice in its essential effect, which is to limit by some measure a non-resident's access to a state's recreational resources by directing disparate economic measures against him. This occurs, moreover, in a context in which Montana continues to experience the greatest increase among the western states in numbers of non-resident hunters relative to numbers of resident hunters. Tr. 191, 250, 291, 306.

CHAPMAN, GADSBY, HANNAH & DUFF
1700 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 223-9100

Finally, notwithstanding that a rational basis may exist to employ the Montana fee structure in order to support a resident political base necessary to underwrite the state's conservation programs, the stated independent ground to limit hunter days is sufficient to sustain the Montana statutes. See California Banker's Assn. v. Schultz, 416 U.S. 21, 71 (1974); Lindsley v. Natural Carbonic Gas, supra.

For these reasons, Appellees respectfully submit that no substantial federal question is raised by this appeal and that the judgment of the United States District Court for the District of Montana should be affirmed by the Supreme Court of the United States.

Respectfully submitted,

Paul A. Lenzini

Paul A. Lenzini
Carl W. Ulrich

Chapman, Gadsby, Hannah and Duff
1700 Pennsylvania Avenue, N.W.
Washington, D. C. 20006
Telephone: (202) 223-9100

Attorneys for Appellees
Fish and Game Commission
of the State of Montana, et al.

Of Counsel:

Clayton R. Herron, Esquire
Special Assistant Attorney General
State of Montana
P. O. Box 783
Helena, Montana 59601

Dated: November 10, 1976

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of November, 1976, one copy of this Motion to Affirm was mailed by airmail, postage prepaid, to James H. Goetz, Esq., 522 West Main Street, P. O. Box 1322, Bozeman, Montana 59715, Counsel for Appellants. I further certify that all parties required to be served have been served.

Paul A. Lenzini

Paul A. Lenzini

CHAPMAN, GADSBY, HANNAH & DUFF

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1976

No. 76-5528

BALDWIN, et al.,

Appellants,

v.

FISH AND GAME COMMISSION, et al.,

Appellees.

STATEMENT OPPOSING APPELLANTS' MOTION
FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Appellees, Fish and Game Commission of the State of Montana, et al., pursuant to Rules 35 and 53 of the Supreme Court of the United States, respectfully urge this Court to deny Appellants' Motion for Leave to Proceed in Forma Pauperis dated October 8, 1976. In support whereof Appellees show as follows:

I.

On October 8, 1976, Appellants Lester Baldwin, et al. moved this Court for permission to proceed in forma pauperis with respect to their appeal from a judgment entered on August 12, 1976[1/] by a Three-Judge District Court convened in the U.S. District Court for the District

---

1/ A verification of the record below indicates that the judgment was in fact entered on August 12, 1976 although Appellants' Motion recites a date of August 11, 1976.

CHAPMAN, GADSBY, HANNAH & DUFF
1700 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 223-9100

of Montana. In support of their motion, Appellants submitted the affidavits of Lester Baldwin, Donald J. Moris and David R. Lee, individually named Appellants herein. These affidavits state, inter alia, that each affiant desires to prosecute this appeal, but because of his poverty, is unable to pay necessary costs or give security therefor and still be able to provide the necessities of life for himself and family. Each affidavit further states that all Appellants are substantially in arrears for payment of legal fees and costs incurred in the District Court action. Appellants further state that their attorney has consented to represent them before this Court on a gratis basis.

II.

Appellees have re-examined sworn statements by Appellants Donald J. Moris and David R. Lee made in depositions taken in Helena, Montana, on January 16, 1976 in the District Court proceeding.[2/] Such statements, while not explicitly contradicting the affidavits of each later filed with this Court, indicate a need for further scrutiny by this Court as to the sufficiency with which each meets the substantive statutory requirements of 28 U.S.C. § 1915, as adopted by Rule 53.1 of this Court.

They indicate, for example, that Mr. Moris, who is employed as an accountant in Lake Elmo, Minnesota, has hunted for sport on trips to Montana in 1969, 1970, 1974 and 1975. Moris Deposition, p. 4. He did not hunt in 1971, 1972 and 1973 because he took family vacations in those years. Id. at 9. Mr. Moris purchased a

---

2/ These depositions were admitted into evidence by the District Court (Tr. 452) and are attached hereto.

CHAPMAN, GADSBY, HANNAH & DUFF
1700 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 223-9100

540-acre ranch west of Melrose, in Beavertail County, Montana, for $96,000 in 1972, which he now leases to Mr. Baldwin. Id. at 11-12. However, Mr. Moris and his family have never resided on this property. Id. at 12. He has paid Mr. Baldwin for his outfitter services a fee of from $225 to $300 in each year he has hunted in Montana. Id. at 10. Mr. Moris did state, however, that a $74 difference in hunting license fee would preclude his coming to hunt in Montana in 1976. Id. at 13. Mr. Moris states that his adjusted gross income in 1974 was approximately $14,000 and that his taxable income was approximately $4,700. He is married and has four children. Id. at 9.

The deposition of Mr. Lee states that he resides in Maplewood, Minnesota, and is employed as an electrician. He has sport hunted in Montana in 1969, 1970, 1973, 1974 and 1975. Lee Deposition, p. 2. He usually spends seven days in Montana during a hunting expedition as well as the day preceding the hunt. Id. at 5. His gross income was $14,500 in 1975. Id. at 4. He has a wife and four children and has vacationed twice with his family in Montana. Id. at 10.

Neither Mr. Moris, Mr. Lee, nor any plaintiff below moved for permission to proceed in forma pauperis in the District Court.

Both Mr. Moris and Mr. Lee stated at the time of their depositions that each was sharing costs of this litigation with the other plaintiffs. Moris Deposition, p. 20; Lee Deposition, p. 10.

III.

Appellees are mindful of the previous pronouncements by this Court which state that a movant to proceed in forma pauperis on appeal

CHAPMAN, GADSBY, HANNAH & DUFF
1700 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 223-9100

need not show complete destitution in order to support his motion. See Adkins v. E. I. DuPont de Nemours & Co., 335 U.S. 331, 339-340 (1948). Appellees are also aware of the public benefit which derives from the ability of poverty stricken litigants to prosecute their claims by virtue of the statutory provision now sought to be invoked. Appellees, however, suggest that the sworn depositions cited above and attached hereto cast doubt on the sufficiency of Appellants' allegations of poverty contained in their filed affidavits. Unless Appellants come forward with a more specific demonstration of need, Appellees respectfully submit that their motion should be denied by this Court.

Respectfully submitted,

Paul A. Lenzini

Paul A. Lenzini
Carl W. Ulrich

Chapman, Gadsby, Hannah and Duff
1700 Pennsylvania Avenue, N. W.
Washington, D. C. 20006
Telephone: (202) 223-9100

Attorneys for Appellees
Fish and Game Commission
of the State of Montana, et al.

Of Counsel:

Clayton R. Herron, Esquire
Special Assistant Attorney General
State of Montana
P.O. Box 783
Helena, Montana 59601

Dated: November 10, 1976

CHAPMAN, GADSBY, HANNAH & DUFF
1700 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 223-9100

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of November, 1976, one copy of this Statement Opposing Appellants' Motion for Leave to Proceed in Forma Pauperis was mailed by airmail, postage prepaid, to James H. Goetz, Esq., 522 West Main Street, P. O. Box 1322, Bozeman, Montana 59715, Counsel for Appellants. I further certify that all parties required to be served have been served.

Paul A. Lenzini

Paul A. Lenzini

INDEX

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BUTTE DIVISION

* * * * * * * * * * * * * * * * * * * *

MONTANA OUTFITTERS ACTION GROUP, LESTER BALDWIN, RICHARD CARLSON, JEROME J. HUSEBY, DAVID R. LEE, and DONALD J. MORIS,

Plaintiffs,

-vs-

FISH AND GAME COMMISSION OF THE STATE OF MONTANA; WESLEY WOODGERD, Director of the Department of Fish and Game of the State of Montana; ARTHUR HAGENSTON; WILLIS B. JONES; JOSEPH J. KLABUNDE; W. LESLIE PENGELLY; and ARNOLD RIEDER, Commissioners of the Fish and Game Commission of the State of Montana,

Defendants.

CV 75-80-BU

DEPOSITION

OF

DONALD J. MORIS

* * * * * * * * * * * * * * * * * * * *

BE IT REMEMBERED: That the deposition of DONALD J. MORIS was taken in shorthand and was also recorded on a tape recorder by Mrs. S. Lynn Hiatt, a Notary Public for the State of Montana, beginning at 1:30 P.M. on the 16th day of January, 1976, at the office of Clayton R. Herron, Attorney at Law, Horsky Block Building, Helena, Montana.

Present were JAMES H. GOETZ, Attorney at Law, 522 West Main, Bozeman, Montana, representing the Plaintiffs; CLAYTON R. HERRON, Attorney at Law, Horsky Block Building, Helena, Montana, representing the Defendants; Lester Baldwin, P. O. Box 118, Melrose, Montana; David R. Lee, 1721 Rosewood Ave.,Maplewood, Minn.

It was stipulated and agreed by and between the parties hereto, acting through their respective counsel, that the deposition of DONALD J. MORIS may be taken at this time and

place, pursuant to agreement of counsel, by the Plaintiffs; and that the deposition may be taken before S. Lynn Hiatt, a Notary Public for the State of Montana, stenographically and by use of a tape recorder and the deposition shall be taken in accordance with the Federal Rules of Civil Procedure for uses therein provided and in accordance therewith; and that all objections, except as to the form of the question, are reserved; and that it is taken pursuant to the Order of the Court dated December 31, 1975.

The following proceedings were had:

DONALD J. MORIS, called as a witness by the Plaintiffs, having been first duly sworn upon his oath, testified as follows:

DIRECT EXAMINATION BY MR. GOETZ

Q Would you state your name for the record?

A Donald J. Moris.

Q What is your occupation?

A Accountant.

Q Where do you live?

A Lake Elmo, Minnesota.

Q Are you generally familiar with this action brought by the Montana Outfitters Action Group and others against the Fish and Game Department of Montana?

A Yes, I am.

Q Are you a Plaintiff individually named in that action?

A Yes, I am.

Q Now, I assume that you have hunted in the State of Montana in the past?

A Yes, I have.

Q What have you hunted for?

A I have hunted for elk in 1969 and 1970 and for sheep in 1974 and elk in 1975.
Q During those seasons, I assume you bought a license to hunt in the State of Montana?
A Yes, I did.
Q And that was some kind of non-resident license, is that true?
A Yes, it was.
Q And that license, it is your understanding, enabled you to hunt for big game in the State of Montana?
A Yes, more than just elk, yes.
Q Now, are you familiar with what is called a non-resident combination license for big game in Montana?
A Yes, I am.
Q What is your understanding of that license?
A It entitles a non-resident to hunt for deer, elk and fish and also hunt birds.
Q O.K., now that was for the 1974 season, for instance, 1975 season?
A Right.
Q And it is changed now to include a bear, is that your understanding?
A Yes.
Q Instead of having two deer on the combination license, you now have only one?
A That is right.
Q Effective 1976 season, is that your understanding?
A Yes.
Q Now, are you a property owner in the State of Montana?
A Yes, I am.
Q What kind of property and where do you have property in Montana?

A I own a ranch west of Melrose, Montana.
Q What is the approximate size of that?
A 540 acres.
Q Are you buying that on a contract?
A Yes, I am.
Q Have you in the past paid any taxes to any agencies of the State of Montana or counties in Montana?
A Yes, I have paid real estate taxes for the years 1972 through 1975.
Q And that went to Beaverhead County?
A Beaverhead County, yes.
Q Now, I believe you have alleged in your complaint in this action that you as an individual are adversely affected by the level of the fees for non-resident big game licenses in Montana?
A That is right.
Q And a combination license also, is that true.
A That is so.
Q Would you explain how you feel you are adversely affected?
A In the years that I have hunted, in '59 which was principally elk, I hunted only elk and I was required to purchase the deer, bird and fish licenses along with the elk license; that was also the case in 1970. In 1974 when I hunted sheep, I was required to purchase the big game license even though I didn't hunt for again those species plus the sheep license and in 1975 when I hunted for elk, I was also required to purchase the deer, fish and -- what's the other one?
Q Bird or -- ?
A Bird license.
Q Now, is it your statement then that you are primarily interested in hunting for one species of animal in most

seasons?
A That is right.
Q And that would be what?
A That would be elk.
Q And in order to do that, you feel you have to buy the licenses -- the big game combination license?
A It is required.
Q What about the level of the license fees; does that in your mind adversely affect you?
A Yes, the increase as I understand it, going from 151 to 225 along with the other increased cost would eliminate my coming to Montana at least for the next couple of years, and I don't know what my position would be from a financial standpoint after that time, but for the next few years it would stop me from coming out here.
Q Is it fair to say that if the fee for hunting elk were lower or you could separate this out from other game, you might well come out these next seasons?
A Yes, that is possible.
Q It would be your intent to come out and hunt if you could economically afford it, is that true?
A Yes, it would.
Q Are you familiar with other hunters who are non-residents of Montana who like to hunt in Montana?
A Yes, I am.
Q These would be primarily from the State of Minnesota?
A Yes, they are. In fact, they are three of the individuals who hunted with me the past year.
Q Have you discussed this increased license fee and combination license of the State of Montana with them?
A Yes, I have.
Q Are they going to be in the same position; are they not

going to come out this next year?

MR. HERRON: I want to make an objection clear in the record. I object to this line of seeking hearsay testimony.

MR. GOETZ: Just for the record, I will respond that the door was opened by the Defendants' counsel at the trial for this kind of testimony, and will have this in the record along with your statement.

A Yes, there were three individuals. Their names were Reginald Zettell, Robert Fiercks and Gregory Benesch; all stating that if the fees went to 225 next year that they would not be hunting in the State of Montana.

MR. HERRON: I am going to enter another objection for the record and move that the testimony be stricken and considered stricken on the grounds that the parties named are not parties to this action and that the testimony is irrelevant, immaterial and incompetent.

Q O.K., Mr. Moris, have you engaged services of outfitters when you have hunted in the State of Montana?
A Yes, I have.
Q Have you done so every year that you have hunted for big game in Montana?
A Yes, I have.
Q Is there any possibility that you will have to -- even if you did hunt in Montana -- have to eliminate the services of outfitters?
A Yes, I have thought very seriously about that.
Q And what is the reason for that?

A With the increased license fee, I would not be able to afford both the increased license fee and the fee of the outfitter.

Q With respect to these hunters that you have talked to from Minnesota, do you think it would be their intention from what you have learned from them to hunt if the license fees weren't so high?

MR. HERRON: I continue to object to the form for calling for a conclusion of the witness as to the state of mind of other people and calling for hearsay evidence and being irrelevant, incompetent and immaterial.

Q Based on what they said to you -- ?

A Their conversations were that if the license fee went up that they would not be hunting in Montana.

Q And was that, did -- ?

A It would suggest to me that they would be hunting if the license fee had not gone up. In fact, one of the individuals has hunted in Montana for three --

MR. HERRON: I object and move it be stricken; it is not responsive to the question.

Q Go ahead.

A Gregory Benesch had hunted in Montana to my recollection three or four years prior to 1975 and has hunted in Montana, and his reply was also that he would not be coming back due to the increase in license fees.

Q Now, you did hunt in the 1975 hunting season in Montana?

A Yes, I did.

Q And you did purchase a combination license -- a big game combination license?

A Yes, I did.

Q Now, in the 1975 hunting season, you got a big game hunting license that included the right to hunt elk and two deer, is that true?

A My recollection is that it was two deer.

Q That generally is called for the deer, an "A" deer tag and a "B" deer tag, is that right?

A Right.

Q What areas of the state did you hunt in?

A Well, it would be along Cherry Creek, which would be in the Gallatin valley, I guess.

Q And that generally is in the west or southwestern part of Montana?

A Yes.

Q And you were hunting primarily or solely for elk, is that true?

A Only for elk, yes.

Q Do you know whether that deer "B" tag that you purchased would be good for that area of hunting?

A To my knowledge, it would not be good for that area.

Q Did you get a chance to hunt in any other area to use your deer "B" tag?

A No, we did not even hunt for the "A" tag here.

Q Now, in 1976, the non-resident combination license includes a bear, is that your understanding?

A Yes.

Q Have you ever hunted for bear in Montana?

A No.

Q Is it your desire to hunt for bear in Montana?

A No.

MR. GOETZ: I have no further questions of this witness.

CROSS-EXAMINATION BY MR. HERRON

Q Mr. Moris, you say you are an Accountant from Saint Elmo, Minnesota, is that correct?

A Lake Elmo.

Q Are you in private practice as an Accountant or are you employed by someone?

A I am employed by someone.

Q Who is that?

A Zayre Shopps' City.

Q What kind of an organization is that?

A It is a retail discount department store chain.

Q How long have you been employed by them?

A 8½ years.

Q And you have hunted in Montana, you say in 1969, 1970, 1974 and 1975, is that correct?

A Right.

Q Was there any special reason why you didn't hunt in 1971, 1972 and 1973?

A I was taking family vacations those years, I guess.

Q So I take it you are married and have a family?

A Yes.

Q And how many children do you have?

A Four.

Q What has been your salary or your income since 1969, generally speaking, up to the present time?

A I would be guessing, but my Federal taxable income last year was $4700; that is 1974; I haven't figured out my income tax yet this year.

Q That is your taxable income?

A Right.

Q And that is after taking deductions, etc. allowed by law?

A Right.

Q What was your gross income before those deductions were taken?

A Going back to 1969?

Q Yes, generally speaking.

A I would be guessing back in 1969. I would say my adjusted gross income in 1974 was approximately $14,000.

Q And that is what became the taxable income of $4700?

A Right.

Q And is that your highest adjusted gross income since 1969, $14,000?

A Yes. It was substantially lower in prior years.

Q On each of these hunting trips to Montana, you did employ services of an outfitter, did you say?

A Yes.

Q And who did you employ?

A Lester Baldwin.

Q Every time?

A Yes.

Q Did he charge you a fee or a price for that?

A Yes, he did.

Q In 1974, how much did you pay your outfitter?

A Approximately -- well, 1974, I hunted for sheep. That year, Lester and I went on a hunt and that particular year there was no fee.

Q How about 1969, 1970; what was the fees you paid?

A To my best recollection, $225 a year.

Q How about in 1975?

A $300.

Q And you paid that, is that correct?

A Yes.

Q How do you travel when you come out here to Montana?

A Usually, I travel with one of the party's automobiles.
Q You say usually; have you ever travelled in any other manner out here?
A In 1974, when I hunted alone, I flew out.
Q Do you remember what the plane fare was about to come and go?
A No, I don't.
Q And you say that -- how many days do you usually hunt with Mr. Baldwin on one of these trips?
A Seven days plus one day going in, which would be a seven day hunt.
Q Now, you say you are buying some real property in the State of Montana, is that correct?
A Yes.
Q And you have some sort of contract or agreement to purchase the property, is that correct?
A That is right.
Q And who is the seller?
A The seller?
Q Yes, who are you buying it from, in other words?
A Wesley Skeeters.
Q Is he from the Dillon area?
A He is from the Melrose area.
Q How much are you contracting to pay for that property?
A Approximately $96,000.
Q Is there any improvements on the property?
A Yes, there are.
Q What are they?
A You mean such as buildings?
Q Yes.
A It has a house, the barn, machine shed and a garage.
Q Who resides in the house?

A Lester Baldwin.
Q Do you stay there when you come out on these hunting trips at all?
A No, we don't hunt in that area.
Q And I suppose you have some sort of a leasing arrangement with Mr. Baldwin, is that true?
A Yes, I do.
Q When did you begin this sale -- what year?
A When did I purchase it?
Q Yes.
A 1972.
Q And you have been making payments ever since, is that correct?
A Yes, I have.
Q I take it you visit the property on these occasions you come to Montana or do you?
A For hunting?
Q Yes.
A No.
Q Do you come otherwise than hunting to the State of Montana?
A Yes, I have come on other occasions.
Q And how often do you come, would you say?
A Well, in 1972, the year that I purchased the property, in looking at the property and closing it, I believe it was two times.
Q And how many times since?
A I did not come last year because I couldn't afford a vacation and also coming out and going hunting, so in 1973, I believe I also came out once.
Q So you and your family have never really resided on the property?
A That is right.

Q And you have hardly ever seen it, just on a very few occasions, since you bought it, is that right?
A That is right.
Q Now, this combination license you talked about, the price is purported to go from, prospectively from $151 to $225, I believe, which is about $74. Is it your testimony that $74 difference is going to prohibit you from coming out here hunting?
A I am saying that next year I would not be coming out because of that increased fee, yes, that is right.
Q That $74?
A Yes.
Q Is it your feeling that the non-resident fee should be lowered or the resident fee should be raised?
A My feeling, I guess, as a non-resident is that the non-resident fee should be lowered.
Q Are you sharing in the expenses of this lawsuit that is being brought by the Plaintiffs?

MR. GOETZ: Objection, and I will instruct the witness not to answer that question. It is improper and irrelevant; don't answer that question.

Q Did you seek to start this lawsuit yourself or participate in it?

MR. GOETZ: Objection again, and don't answer.

MR. HERRON: For the record, I think I am entitled to ask these questions on the grounds to see if he really is a real party to the interest or if his appearance here is just sham and pretense.

Q Do you have any idea how much it costs on these trips to

come out here by automobile?
A For vacation?
Q No, for the hunting trips that you have mentioned.
A Yes, it cost me last year approximately -- you are saying just for the automobile -- $30 for gas.
Q And did you stay the entire time in whatever accommodations were provided by Mr. Baldwin, the outfitter?
A No, I stayed at a motel that cost $4 an evening for a few evenings before we went in. Other than that, I was with Mr. Baldwin for the rest of the time.
Q You got a motel room for $4 a night?
A Yes, it is in Ennis -- Saunders Motel.
Q Now, at the time you -- in 1969, 1970, 1974, 1975, I take it that you applied for and received a hunting license in the State of Montana in each of those years, is that correct?
A Yes.
Q What was the fee in 1969 license year?
A In 1969 I had to pay $154 because I was bow and arrow hunting, and that is higher than the license hunting with a rifle. In 1970 it went to $154. In 1974 to my best recollection, it was $151 for the combination license and $50 to my best recollection for the sheep license, and in 1975, it was $151 for the combination license.
Q And how were your successes in each of those years?
A I have not had any success in killing or bagging anything in the State of Montana in either of those years.
Q In other words, in '69, '70, '74, '75, you had no success at all?
A That is right.
Q While you were hunting for elk in those years '69, '70 and

'75, did you see any elk?

A I saw elk in 1969 and 1970; I did not see any elk in 1974 or 1975.

Q And how about the sheep; did you see any sheep?

A I did not see any sheep.

Q What area were you sheep hunting in?

A Papoose Creek.

Q Could you locate that?

A It is in the Hillgart Range.

Q Is that generally the Melrose area?

A I believe it is south of Melrose -- well, it is south and east of Ennis.

Q Have you ever hunted in any other states, other than Montana?

A Wisconsin.

Q Any others?

A No.

Q What did you hunt for in Wisconsin?

A Deer.

Q Do you ever hunt in Minnesota?

A Yes.

Q Do you recall what you paid for a hunting license in Minnesota?

MR. GOETZ: I will object to that as irrelevant; go ahead and answer.

A I believe it was $7.50.

Q In Wisconsin?

A For Minnesota.

Q What was it in Wisconsin?

A $25.

Q And these were for deer hunting licenses, is that correct?

A Yes, Wisconsin was a non-resident license.

Q As far as these times you elk hunted in Montana, have you ever seen any deer?

A Yes, I have.

Q Have you hunted all these years with a bow?

A In 1969 and 1970, I hunted with a bow. In 1974, I hunted with a rifle, and in 1975, I hunted with a rifle.

Q And when you hunted with a bow, that is all you hunted with, is that correct?

A Yes.

Q And when you hunted with a rifle, that is all you hunted with, correct?

A Yes.

Q In these years, how did you go about getting your license -- did you write for it or how did you go about the procedure of getting it?

A I mailed an application to the Game and Fish Department in Helena, Montana.

Q And that was for each of these four years, is that correct?

A To the best of my recollection, that is how they were -- in '69 and '70, I frankly can't recall, but I think that is how I would have applied.

Q Prior to the time of filing this lawsuit, did you ever make any protest of any kind as to the amount of the fees that you were paying?

MR. GOETZ: Objection; irrelevant and immaterial. Go ahead and answer.

A I have complained to Les seeing as how he was a resident that I felt the fee was high, and I also felt it unfair that the bow and arrow license should be more than the rifle license but to register a complaint with the State, I did not.

Q And these licenses you applied for -- you did pay the

fee in each case, is that right?
A Yes, I did.
Q Along with the payment of the fee, did you file any protest of any kind?
MR. GOETZ: Objection as irrelevant and immaterial. Go ahead and answer.
A I did not.
Q So the only states you have hunted in are Minnesota, Wisconsin and Montana, is that correct?
A Yes.
Q In any of these years -- in 1969 and 1970 and 1975 when you hunted for elk, did you ever exercise any of the other privileges granted by that license other than hunting for elk?
A No, I did not.
Q You didn't fish or hunt for birds or deer or anything like that?
A No.
Q Can you tell us why you didn't show up at the hearing that was held at the end of December on this matter in Missoula, Montana?
A Why I didn't show up for the hearing?
Q Yes.
MR. GOETZ: Objection. That has been covered, and I will instruct the witness not to answer it.
MR. HERRON: It hasn't been covered by the witness.
MR. GOETZ: It is irrelevant; you know good and well.
MR. HERRON: I have no more questions of this witness except a note for the record that I do reserve the right to present the question to the court as to whether

answers shouldn't be compelled to the questions that have been instructed to the witness.
MR. GOETZ: Let's hold this open a second. We will take a short recess.
MR. HERRON: O.K.
(BRIEF RECESS)
MR. GOETZ: Let me say for the record that we have recessed and during Mr. Herron's cross-examination of Mr. Moris, a number of questions came up to which I entered objections and instructed the witness not to answer and because both witness, Mr. Moris, and the next witness scheduled, Mr. Lee, have come a long way at personal expense to testify, that is from Minneapolis, and in order to preclude the possibility of having them having to come out again to answer questions to which we have entered objections, I am prepared to say that I will let Mr. Moris testify as to these questions for the record, and I will maintain my objection. Now the questions -- it is my understanding of the questions were essentially whether Mr. Moris is sharing the costs of the lawsuit, and I am willing to let Mr. Moris answer that by a "yes" or "no" answer. I don't think it is proper for the defense counsel to go into his share of the costs or how much he has paid, but I will let

him enter an answer "yes" or "no" to the question. The next question that I think that I objected to was whether Mr. Moris brought this lawsuit himself or whether he was part of the instigation of this lawsuit -- something of that nature, and the rationale of Mr. Herron is that he has a right to know whether this is a sham lawsuit vis-a-vis Mr. Moris or not. My feeling on both of these questions is that they are highly objectionable; the defense counsel does not have the right to inquire, discover into the motivation or instigation of the lawsuit but as I say, because of the expense involved, I have instructed my witness to go ahead and answer that question or those questions. However, if the questions go further than that, I will object and instruct the witness not to answer. The other question was related to why Mr. Moris didn't show up at the trial on the 29th, 30th and 31st; I simply think that is an irrelevant and immaterial question. I have decided on that one also to allow Mr. Herron to inquire into that question just to avoid problems later on. I still think it is an objectionable question. With that statement, I will allow you to proceed on those bases, Mr. Herron.

Q Well, Mr. Moris, the first of the questions that we were discussing here lawyer-like was as to whether or not you are sharing the costs of prosecution of this lawsuit. Do you want to answer that now?

A The answer is yes.

Q Another question as to the -- I forget how the question was phrased, but what I was getting at is did you seek the prosecution or instigation of this lawsuit or were you sought out by someone else to instigate the lawsuit?

A I was involved with the lawsuit from the beginning.

Q Yes, I understand that, but what I am getting at, did somebody seek you out in order to avail themselves of your status as a non-resident?

A My recollection was that I was notified that the non-resident fee would be increased for the State of Montana. While it was being heard in the Legislature, I called the Governor's office and objected to the increased fee and after I heard it was not voted down in the Legislature, I, in a telephone conversation with Mr. Baldwin, decided that we would seek legal action to see if we could get it reduced.

Q And are you referring there to the $225 fee?

A Yes, I am.

Q Did you ever take similar action or procedures as to the $151 fee?

A Other than to voice my objection to Mr. Baldwin, I did not.

Q I take it, for the new fee -- in other words, the hunting season that will come up here in 1976, you have not applied for nor have you received any license, have you?

A I have not applied for, and if the fee goes to $225, will I apply for a license in that year.

Q I guess it goes without saying, you haven't paid any $225 for a fee for this year?
A To my knowledge, no one would have paid that fee because it hasn't been established yet.
Q I realize that; I just want to establish for the record; you have not paid it anyway?
A No, I have not.
Q The third question was as to your non-attendance on the trial in December in Missoula; would you care to answer that now?
A I thought that our testimony would be acceptable by affidavit, and I think it was the middle of December before I found out that it would not be, and at that time, Mr. Lee and Mr. Baldwin were arranging air travel arrangements; Mr. Lee can comment on the problem in getting air travel.
Q Whatever there was involved in the trouble with the travel, Mr. Lee knows about, is that correct?
A That is right.
Q At any rate, you did not attempt or seek to drive out here by automobile during this time?
A No.

MR. HERRON: I guess that is all the questions I have.

MR. GOETZ: I have one other question.

REDIRECT EXAMINATION BY MR. GOETZ

Q Mr. Moris, now you testify that you hunted in Minnesota, and you paid $7 for a license. My understanding is that that is for a deer license, is that true?
A That is for a deer license only.
Q Do you know what year that was?
A 1975.

MR. GOETZ: I have no further questions.

MR. HERRON: That is all I have.

(WITNESS EXCUSED)

s/ Donald J. Moris
Donald J. Moris, Witness

CHANGES MADE BY THE WITNESS, DONALD J. MORIS,

IN THE FOREGOING DEPOSITION

Page No.	Line No.	Change	Reason
6	12	Sidecks	Sidecks spelled wrong
9	9	Sage Steppes City	Sheeps' Spelled wrong
4	20	1802	50 not 2000

/s/ Donald J. Moris

Donald J. Moris, Witness

CERTIFICATE

STATE OF MONTANA)
ss.
County of Lewis and Clark)

I, S. Lynn Hiatt, a Notary Public for the State of Montana, do hereby certify that heretofore, to-wit, on the 16th day of January, 1976, at 1:30 P.M., personally appeared before me, DONALD J. MORIS, 9759 45th Street North, Lake Elmo, Minnesota, a witness called by the Plaintiffs in a certain action now pending and undetermined in the United States District Court, for the District of Montana, Butte Division, entitled: Montana Outfitters Action Group, Lester Baldwin, Richard Carlson, Jerome J. Huseby, David R. Lee, and Donald J. Moris, Plaintiffs, vs. Fish and Game Commission of the State of Montana; Arthur Hagenston; Willis B. Jones; Joseph J. Klabunde; W. Leslie Pengelly; and Arnold Rieder, Commissioners of the Fish and Game Commission of the State of Montana, Defendants, bearing cause number CV 75-80-BU.

I further certify that the said witness was by me first duly sworn to testify to the truth, the whole truth and nothing but the truth in relation to the matters in controversy herein, insofar as he should be interrogated concerning the same; that the testimony then given by him was by me reduced to writing in the presence of the said witness by means of shorthand, and was also recorded upon a tape recorder, and thereafter transcribed upon a typewriter by me.

I further certify that the deposition was taken in pursuance to stipulation of counsel, made a part of this record.

I further certify that after the said testimony had been transcribed, it will be mailed to the witness for review, correction and signature before any Notary Public, and thereafter

returned to Mr. James H. Goetz for filing.

I further certify that there were present at the taking of the deposition, MR. JAMES H. GOETZ, Attorney at Law, 522 West Main, Bozeman, Montana, representing the Plaintiffs; MR. CLAYTON R. HERRON, Attorney at Law, Horsky Block Building, Helena, Montana, representing the Defendants; Mr. Lester Baldwin, P. O. Box 118, Melrose, Montana, and Mr. David R. Lee, 1721 Rosewood Avenue, Maplewood, Minnesota.

I further certify that I am not a relative, attorney nor counsel of any of the parties, nor a relative or employee of such attorney or counsel, and that I am not directly or indirectly interested in the matter in controversy.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Notarial Seal this 27th day of February, 1976.

/s/ S. Lynn Hall
NOTARY PUBLIC for the State of Montana
Residing at Helena, Montana
My Commission expires August 15, 1978.

(Notarial Seal)

STATE OF MINNESOTA)
ss.
County of Ramsey)

On this 26th day of February, 1976, before me, a Notary Public for the State of Minnesota, personally appeared DONALD J. MORIS, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

/s/ [illegible]
NOTARY PUBLIC for the State of Minnesota
Residing at [illegible]
My Commission expires [illegible]

(Notarial Seal)

United States of America)
District of Montana) ss

I, the undersigned, Clerk of the United States District Court for the District of Montana, do hereby certify that the annexed and foregoing is a true and full copy of an original document on file in my office as such Clerk.

Witness my hand and Seal of said Court this _____ day of _____

JOHN E. PEDERSON
Clerk

By _____ Deputy Clerk,

United States of America)
District of Montana) SS

I, the undersigned, Clerk of the United States District Court for the District of Montana, do hereby certify that the annexed and foregoing is a true and full copy of an original document on file in my office as such Clerk.

Witness my hand and Seal of said Court this _____ day of _____

JOHN E. PEDERSON
Clerk

By _____ Deputy Clerk,

I N D E X

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BUTTE DIVISION

* * * * * * * * * * * * * * * * * * * *

MONTANA OUTFITTERS ACTION GROUP, LESTER BALDWIN, RICHARD CARLSON, JEROME J. HUSEBY, DAVID R. LEE, and DONALD J. MORIS,

Plaintiffs,

-vs-

FISH AND GAME COMMISSION OF THE STATE OF MONTANA; WESLEY WOODGERD, Director of the Department of Fish and Game of the State of Montana; ARTHUR HAGENSTON; WILLIS B. JONES; JOSEPH J. KLABUNDE; W. LESLIE PENGELLY; and ARNOLD RIEDER, Commissioners of the Fish and Game Commission of the State of Montana,

Defendants.

CV 75-80-BU

DEPOSITION

OF

DAVID R. LEE

* * * * * * * * * * * * * * * * * * * *

BE IT REMEMBERED: That the deposition of DAVID R. LEE was taken in shorthand and was also recorded on a tape recorder by S. Lynn Hiatt, a Notary Public for the State of Montana, beginning at 2:25 P.M. on the 16th day of January, 1976, at the office of Clayton R. Herron, Attorney at Law, Horsky Block Building, Helena, Montana.

Present were JAMES H. GOETZ, Attorney at Law, 522 West Main, Bozeman, Montana, representing the Plaintiffs; CLAYTON R. HERRON, Attorney at Law, Horsky Block Building, Helena, Montana, representing the Defendants; Lester Baldwin, P. O. Box 118, Melrose, Montana; Donald J. Moris, 9759 45th Street North, Lake Elmo, Minnesota.

It was stipulated and agreed by and between the parties hereto, acting through their respective counsel, that the

deposition of DAVID R. LEE may be taken at this time and place, pursuant to agreement of counsel, by the Plaintiffs; and that the deposition may be taken before S. Lynn Hiatt, a Notary Public for the State of Montana, stenographically and by use of a tape recorder and the deposition shall be taken in accordance with the Federal Rules of Civil Procedure for uses therein provided and in accordance therewith; and that all objections, except as to the form of the question, are reserved; and that it is taken pursuant to the Order of the Court dated December 31, 1975.

The following proceedings were had:

DAVID R. LEE, called as a witness by the Plaintiffs, having been first duly sworn upon his oath, testified as follows:

DIRECT EXAMINATION BY MR. GOETZ

Q Would you state your name please for the record?
A David R. Lee.
Q Where do you reside?
A Maplewood, Minnesota.
Q What is your occupation?
A I am an Electrician.
Q Have you ever engaged in big game hunting in the State of Montana?
A Yes, I have.
Q What have you hunted for?
A Elk.
Q What hunting seasons have you hunted in Montana for elk?
A I hunted '69 and '70 with a bow and arrow for elk; '73, '74 and '75 with a rifle for elk.
Q Now, did you during those years engage the services of an outfitter?

A Yes, I did.
Q Who was the outfitter?
A Lester Baldwin.
Q During those years you hunted for elk, you had to purchase what is known as a non-resident combination license, is that true?
A Right.
Q For those seasons, do you recall what the non-resident combination license included?
Elk and there is two deer tags; fish and birds.
Q What areas of the State of Montana did you primarily hunt in?
A The southwestern part.
Q Were you looking for deer at all?
A No, I wasn't.
Q You are familiar with what is generally called the deer "A" tag and the deer "B" tag?
A Yes, I am.
Q Are you familiar with the areas in the State of Montana where the deer "B" tag is valid?
A No, I am not.
Q Did you get a chance to use that deer "B" tag at all -- have you ever had a chance to use it?
A I wouldn't have in that area that I hunted, if I was hunting deer.
Q And you weren't hunting deer, is that your -- ?
A No.
Q You are aware, I assume, that the non-resident combination license for the hunting year 1976 will include one elk, one deer and one bear, among other things?
A Right, I heard that.
Q In order for you to hunt elk, you will have to buy this

combination license, is that your understanding?
A Right.
Q Is it your desire to hunt for bear in Montana?
A No, it is not.
Q How about -- have you ever hunted for bear in the State of Montana?
A No, I haven't.
Q Is it your desire to continue hunting in the State of Montana?
A I would enjoy hunting in the State of Montana; if the fees became so that I could come, I would come every year. I plan on coming every year but if the license does go to $225, I will probably have to restrict my hunting to, let's say, every other year or if it would get higher than that, I would have to discontinue it completely because it is right on the fringe of my budget.
Q What is your income approximately during a given year?
A This year, my income was $14,500.
Q Is that your gross income?
A Right.
Q And you work -- did you state your occupation?
A Electrician.
Q Is it your feeling that if the combination license were eliminated and you could buy a license to hunt elk only, that is probably what you would do?
A Definitely.
Q If that elk only license were cheaper than the present combination license, it would be cheaper for you to hunt, I assume, in the State of Montana, is that true?
A True, yes.
Q And that is because you hunt only for elk?

A Yes.
Q Now, how much time do you usually spend in Montana when you come on a hunting expedition?
A Seven days of the hunt in the mountains and the day before usually.
Q Does it, in your opinion, usually take about seven days to conduct a legitimate hunt for elk?
A I don't think that is long enough, no, is that what you mean?
Q Yes, what I am asking I guess is would you have time if you wanted to hunt deer, would you have time to take some extra time to hunt deer?
A No, my vacation time is such that I am limited to the amount of time.
Q You, I assume, know other Minnesotans who engage in big game hunting in the State of Montana?
A Yes, I know several.
Q Have you had a chance to discuss this non-resident combination license and these increased fees in Montana with other people?
A Yes, I have.
Q To your knowledge, are these people essentially in the same position you are?
MR. HERRON: I will object to it as calling for hearsay evidence.
A The other two plaintiffs.
Q Are you familiar with the other two plaintiffs?
A Yes, I talked to them just before I came out here.
Q What are their names?
A Jerome Huseby and Richard Carlson.
Q Are they in essentially the same position you are?
MR. HERRON: I object to it as calling for hearsay.

A They are not coming to the State of Montana again if the license fees increase.

Q Now, if you do continue to come to Montana hunting in ultimate years or whatever, is there a possibility that you will have to eliminate paying for the services of an outfitter in order to afford hunting?

MR. HERRON: I object as calling for speculation of self-serving testimony and argumentative.

A I have given thought to hunting every year without an outfitter; I mean that would be one way of fitting it into my budget if they increase the license, or I have even considered going to a different state where the license fees are comparable to what the license fees have been in Montana.

Q Is it your testimony that if the $225 non-resident combination license becomes effective, you are going to either have to eliminate your hunting or cut back on it and do it in alternate years in Montana?

MR. HERRON: I object to that question as being leading and argumentative.

MR. GOETZ: I will rephrase the question if there is an objection.

Q You are a Plaintiff in this lawsuit -- an individually named Plaintiff, aren't you?

A Yes.

Q You as well as the other Plaintiffs, I believe, have alleged that you and the other Plaintiffs are adversely affected by this combination license for non-residents and also by the high non-resident big game license fee, you are adversely affected by that, is that true?

A Yes.

Q Would you tell us generally how you are so adversely affected and how the other Plaintiffs are to your knowledge?

A We just couldn't afford to come every year. The other two that I have hunted with in the past couldn't afford to come at all, and I would have to consider coming every other year or consider hunting without an outfitter in the State of Montana or not coming to Montana at all; going to another state.

MR. GOETZ: I have no further questions of this witness.

CROSS-EXAMINATION BY MR. HERRON

Q Mr. Lee, what other states have you hunted in, other than Montana?

A Wisconsin and Minnesota.

Q Any others?

A No.

Q Have you been on the same hunting parties with the last gentleman that testified, Mr. Moris?

A Yes.

Q Do you do most of your hunting together, is that correct?

A No, not in just the past few years, I guess, the last four years, I haven't hunted with Don.

Q The only thing you say you have hunted for is elk in Montana, is that correct?

A Correct.

Q Have you had any success?

A I did shoot a bull in '73; other than that, I shot nothing.

Q What did you do with that bull after he was shot?

A I split it up with the other people in our party and ate it.

Q Where? In Montana or back in Minnesota?
A I took it home.
Q How about the head cape; what disposition was made of that?
A I took the horns only.
Q What did you do with them; did they mount them at home?
A No, they are not. They are laying in the garage right now. I intend to some day have them mounted or mount them on a board or something.
Q How many antlers were involved; how many points --?
A There were five on one side and four on the other.
Q And that is the only success you have had hunting, is that correct?
A Right.
Q And you say that you have or might have to comtemplate hunting in other states other than Montana, is that correct?
A Yes.
Q And what states have you considered?
A Idaho.
Q Do you know what the non-resident fee is for hunting elk in Idaho?
A They have a prerequisite license like Montana has now; birds and fish for $50, and elk hunting license for $100.
Q What have you hunted in Minnesota and Wisconsin?
A Deer.
Q Are there any elk there to be hunted as far as you know?
A No.
Q If I understand your testimony correctly, you feel that you could afford the $151 license fee, but you may not be able to afford the $225 license fee, is that correct?
A Yes.
Q Or that you could possibly afford the $225 license fee

by dispensing with the services of an outfitter, is that correct?
A Yes.
Q Have you used the services of an outfitter each time you have hunted in Montana?
A Yes.
Q Was that Mr. Baldwin in each case?
A Yes.
Q What fees did you pay him for each of those years?
A In '69, I think it started at $225, and last year it was $300.
Q Did that provide anything more than the guiding and the transportation or did it provide food and lodging, too?
A Food and tent.
Q Did you on each of these occasions come out here by automobile with Mr. Moris?
A In '69 and '70, yes; in '73, '74 and '75, with other people.
Q. Did you always come by automobile?
A Yes.
Q And how did you come here for these proceedings today?
A By airplane.
Q What was the fare approximately?
A $174 -- or $176.
Q Is that round trip?
A Right.
Q What other expenses did you have when you came on these hunting trips besides the outfitter, the transportation; did you stay in motels here?
A I usually stay in a motel the night before we go in the mountains.
Q Did you likewise find the rates at $4 a night?
A Yes, I did.

Q The same questions I asked Mr. Moris; are you sharing the costs of this litigation, fees, etc.?

MR. GOETZ: I will object to that question again as being highly improper; I will instruct the witness to go ahead and answer with a "yes" or "no" answer, but go no further.

A Yes.

Q How did you happen to be a Plaintiff in this suit? Did you instigate the lawsuit or were you solicited to take part in it by somebody else?

MR. GOETZ: I will object again to that question and instruct the witness to answer, but I think it is a highly improper question.

A The other two Plaintiffs that are here, Don and I and Lester Baldwin were, I think, equal in initiating the action through telephone calls, letters, etc.

Q By whom are you employed in the State of Minnesota?

A Hoffman Electric.

Q How long have you worked for them?

A Eight years.

Q Have you ever come to Montana other than for reasons of hunting?

A Yes, I have; I came on vacation.

Q How many times?

A Twice.

Q In what area, generally, did you vacation in Montana?

A Yellowstone, West Yellowstone.

Q Are you a family man; do you have a wife and children?

A I have a wife and four children.

Q Do you own any property in the State of Montana?

A No, I don't.

Q While you were elk hunting in the State of Montana, did you ever see deer?

A Yes, I did see deer.

Q Did you ever fire at the deer?

A No.

Q I take it you have never hunted for sheep?

A No.

Q So the last time you applied for a non-resident hunting license in the State of Montana was for the 1975 season, which is this past season, is that correct?

A Yes.

Q And you paid $151?

A Yes.

Q Just for the record; you haven't applied for nor paid for any $225 combination license to this date?

A No.

Q I take it because you don't own any property in Montana, you haven't paid any property taxes in the State of Montana; have you paid any taxes at all to the State of Montana?

A I think through license fees, it could be considered a tax.

Q These hunting licenses?

A Yes.

Q Anything else?

A No. I don't know; does the State have a sales tax?

Q No.

A The answer is no.

Q When you have hunted in Montana, have you used horses?

A Yes.

Q Are those Mr. Baldwin's horses?

A Yes.

Q You or no member of your hunting party has ever brought horses with you or anything like that?

A No.

MR. HERRON: That is all the questions I have.

MR. GOETZ: I have no further questions.

(WITNESS EXCUSED - 3:00 P.M.)

/s/ David R Lee
DAVID R. LEE, Witness

CHANGES MADE BY THE WITNESS, DAVID R. LEE
IN THE FOREGOING DEPOSITION

Page No.	Line No.	Change	Reason

David R. Lee, Witness

CERTIFICATE

STATE OF MONTANA)
ss.
County of Lewis and Clark)

I, S. Lynn Hiatt, a Notary Public for the State of Montana, do hereby certify that heretofore, to-wit, on the 16th day of January, 1976, at 2:25 P.M., personally appeared before me, DAVID R. LEE, 1721 Rosewood Avenue, Maplewood, Minnesota, a witness called by the Plaintiffs in a certain action now pending and undetermined in the United States District Court, for the District of Montana, Butte Division, entitled: Montana Outfitters Action Group, Lester Baldwin, Richard Carlson, Jerome J. Huseby, David R. Lee, and Donald J. Moris, Plaintiffs, vs. Fish and Game Commission of the State of Montana; Arthur Hagenston; Willis B. Jones; Joseph J. Klabunde; W. Leslie Pengelly; and Arnold Rieder, Commissioners of the Fish and Game Commission of the State of Montana, Defendants, bearing cause number CV 75-80-BU.

I further certify that the said witness was by me first duly sworn to testify to the truth, the whole truth and nothing but the truth in relation to the matters in controversy herein, insofar as he should be interrogated concerning the same; that the testimony then given by him was by me reduced to writing in the presence of the said witness by means of shorthand, and was also recorded upon a tape recorder, and thereafter transcribed upon a typewriter by me.

I further certify that the deposition was taken in pursuance to stipulation of counsel, made a part of this record.

I further certify that after the said testimony had been transcribed, it will be mailed to the witness for review, correction and signature before any Notary Public, and thereafter returned to Mr. James H. Goetz for filing.

I further certify that there were present at the taking of the deposition, MR. JAMES H. GOETZ, Attorney at Law, 522 West Main, Bozeman, Montana, representing the Plaintiffs; MR. CLAYTON R. HERRON, Attorney at Law, Horsky Block Building, Helena, Montana, representing the Defendants; Mr. Lester Baldwin, P. O. Box 118, Melrose, Montana; and Mr. Donald J. Moris, 9759 45th Street North, Lake Elmo, Minnesota.

I further certify that I am not a relative, attorney nor counsel of any of the parties, nor a relative or employee of such attorney or counsel, and that I am not directly or indirectly interested in the matter in controversy.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Notarial Seal this 22nd day of February, 1976.

/s/ S. Lynn Hiatt
NOTARY PUBLIC for the State of Montana
Residing at Helena, Montana.
My Commission expres August 15, 1978.

(Notarial Seal)

STATE OF MINNESOTA)
ss.
County of Ramsey)

On this 13th day of February, 1976, before me, a Notary Public for the State of Minnesota, personally appeared DAVID R. LEE, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

/s/ Evelyn C. Abiad
NOTARY PUBLIC for the State of Minnesota
Residing at St Paul.
My Commission expires _____.

(Notarial Seal)

United States of America)
District of Montana ___) SS

I, the undersigned, Clerk of the United States District Court for the District of Montana, do hereby certify that the annexed and foregoing is a true and full copy of an original document on file in my office as such Clerk.

Witness my hand and Seal of said Court this 24
day of November 1976

JOHN E. PEDERSON
Clerk

By Elena Clark
Deputy Clerk

No. 76-1150

Supreme Court of the United States

OCTOBER TERM, 1976

LESTER BALDWIN, RICHARD CARLSON, JEROME J. HUSEBY, DAVID R. LEE, and DONALD J. MORIS,

Appellants,

v.

FISH AND GAME COMMISSION OF THE STATE OF MONTANA; WESLEY WOODGERD, Director of the Department of Fish and Game of the State of Montana; ARTHUR HAGENSTON; WILLIS B. JONES; JOSEPH J. KLABUNDE; W. LESLIE PENGELLY; and ARNOLD REIDER, Commissioners of the Fish and Game Commission of the State of Montana,

Appellees.

ON APPEAL FROM THE U. S. DISTRICT COURT
DISTRICT OF MONTANA
BUTTE DIVISION

BRIEF OF APPELLANTS

JAMES H. GOETZ
Goetz & Madden
P.O. Box 1322
Bozeman, Montana 59715
Attorney for Appellants

INDEX

PAGE

Argument--Continued

PAGE

Argument--Continued

CITATIONS

PAGE

PAGE

PAGE

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1150

LESTER BALDWIN, RICHARD CARLSON, JEROME J. HUSEBY, DAVID R. LEE, and DONALD J. MORIS,

Appellants,

-vs-

FISH AND GAME COMMISSION OF THE STATE OF MONTANA; WESLEY WOODGERD, Director of the Department of Fish and Game of the State of Montana; ARTHUR HAGENSTON; WILLIS B. JONES; JOSEPH J. KLABUNDE; W. LESLIE PENGELLY; and ARNOLD REIDER, Commissioners of the Fish and Game Commission of the State of Montana,

Appellees.

ON APPEAL FROM THE U. S. DISTRICT COURT

DISTRICT OF MONTANA

BUTTE DIVISION

BRIEF OF LESTER BALDWIN, ET AL., APPELLANTS

OPINIONS BELOW

The opinion of the Three-Judge District Court (A. pp. 59-80), is reported at 417 F. Supp. 1005.

JURISDICTION

This action was instituted on June 23, 1975, pursuant to Title 42 U.S.C. §1983; Title 28 U.S.C. §1343, Title 28 U.S.C. §2281; Title 28 U.S.C. §§2201, 2202; and Article IV, Section 2 (Privileges and Immunities) and the Fourteenth Amendment to the United States Constitution, challenging the constitutionality of the license fee system of the State of Montana for the hunting of big game (Section 26-202.1, R.C.M., 1947). The Statutory District Court, by District Judges Russell E. Smith and William J. Jameson, filed its opinion on August 11, 1976, denying Plaintiffs' claims. Circuit Judge James Browning filed a dissenting opinion. (A. pp. 59-80).

The jurisdiction of the Supreme Court to review the decree of the Statutory District Court by direct appeal is conferred by Title 28 U.S.C. §1253.

QUESTIONS PRESENTED

1. Whether the Montana statutory scheme relating to big game license fees which imposes substantially higher license fees on nonresident hunters and which requires that nonresidents, but not residents, purchase a "combination" license for various species of game in order to hunt big game in Montana, denies to nonresidents their

constitutional rights guaranteed them under Article IV, Section 2 (Privileges and Immunities) and the Fourteenth Amendment (Equal Protection) of the United States Constitution.

2. Whether the Montana statutory scheme relating to big game license fees which imposes substantial burdens (financial and otherwise) on nonresident hunters but not on resident hunters, which cannot reasonably be justified on any cost basis, can nevertheless survive a constitutional challenge on the basis that political support of the local citizenry for the big game management program in Montana may evaporate in the absence of discrimination against nonresident hunters.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved in this case are: Article IV, Section 2, United States Constitution; and the Fourteenth Amendment to the United States Constitution. The statutory provisions involved are: Section 26-202.1, Revised Codes of Montana, 1975 version and 1976 [amended] version. The text of Section 26-202.1, R.C.M., is set forth at pp. 30-45 of the Appendix.

STATEMENT OF THE CASE

This action was filed on June 23, 1975. Plaintiffs-Appellants Carlson, Huseby, Lee and Moris are Minnesota residents who regularly hunt for big game, particularly elk, in the State of Montana. (See Depositions of Lee [pp. 12-15] and Moris [pp. 1-5, 7 and 8]).[1] Appellant Lester Baldwin is a licensed outfitter (hunting guide) in the State of Montana whose business is substantially dependent on nonresident hunters. (Tr. p. 140).

Appellants challenge the constitutionality of the following two statutory schemes relating to big game hunting embodied in Section 26-202.1, R.C.M., 1947:

1. The license fee structure which grossly discriminates against the nonresident hunter.
2. The arbitrary imposition upon nonresident hunters, but not resident hunters, of the big game "combination" license for the right to hunt certain species of big game,

---

[1]By leave of the Court, Plaintiffs Moris and Lee were allowed to testify by deposition because they were unable to attend the evidentiary hearing. (Tr. p. 452).

particularly elk.[2]

Defendants-Appellees are the Fish and Game Commission of the State of Montana, the individual Fish and Game Commissioners of the State of Montana, and Wesley Woodgerd, Director of the Fish and Game Department of the State of Montana.

The contribution to Montana hunting by all citizens of the United States is substantial in terms of accessible federally-owned land on which to hunt, federally-owned wildlife habitat, financial contributions from the federal government through

---

[2]In the 1975 hunting season, in order to hunt elk in Montana, the nonresident hunter was required to purchase a "combination" license ($151.00 fee) which entitled him to take one elk and two deer. The resident was not required to purchase a "combination" license, but instead could purchase a license solely for elk at a cost of $4.00. In the 1976 hunting season, in order to hunt elk in Montana, the nonresident was required to purchase a "combination" license ($225.00 fee) which entitled him to take one elk, one deer, and one black bear. The resident was not required to purchase a "combination" license in 1976, but instead could purchase a license solely for elk at a cost of $9.00.

the Pittman-Robertson Act, 16 U.S.C. 669, et seq. (Plaintiffs' Exhibits 5 and 6), and other contributions from the federal budget for general environmental enhancement. Approximately thirty percent (30%) of the land in Montana is federal land. (A. 57). A significant portion of elk habitat in Montana is on federal land. (A. 57). Approximately seventy-five percent (75%) of the elk and eighty-five percent (85%) of the bear taken in Montana are taken on federal lands. (A. 57).

Furthermore, the operating budget of the Montana Fish and Game Department is heavily dependent on contributions from nonresident sportsmen. Only about two percent (2%) of the budget of the Fish and Game Department comes from the general fund of the State of Montana. (Plaintiffs' Exhibit 1, Montana Executive Budget). The Department is heavily dependent on license fee income and particularly dependent on revenues derived from nonresident hunters and fishermen (approximately two-thirds of the Fish and Game Department's license revenue comes from nonresidents). (Tr. 34).

The challenge of Plaintiffs-Appellants is based on the privileges and immunities clause of Article IV, Section 2, of the United States Constitution and on the

equal protection clauses of the Fourteenth Amendment of the United States Constitution. (A. 27).

Plaintiffs' Complaint sought a declaratory judgment that said statutory scheme was unconstitutional, an injunction against enforcement of the statute and damages for each nonresident plaintiff who had purchased a big game license to the extent that the license fee for nonresident hunters exceeded the costs to the State of Montana "reasonably related to the additional costs of enforcement of the State Fish and Game laws and of contribution to conservation programs." (A. 29).

Plaintiffs have taken the position throughout this lawsuit that the State of Montana could, consistent with the United States Constitution, assess a higher fee for nonresident big game hunting than for residents, but that such higher fee is constitutional only to the extent that it either compensates the State for revenues expended by the State for the added enforcement burden nonresidents impose on Montana, if any; and/or, reasonably compensates the State for conservation expenditures made by the State for fish and game purposes from resident-paid taxes. See generally, Mullaney v. Anderson, 342 U.S. 415 (1952), and Toomer v.

Witsell, 334 U.S. 385 (1948).

A statutory three-Judge District Court was convened pursuant to 28 U.S.C. §2281.[3] An evidentiary hearing was held by stipulation before a single Judge and a transcript thereon prepared and submitted to the three-Judge Court.

The District Court rendered its decision on August 11, 1976, rejecting all of Plaintiffs' claims (Judge Browning, Circuit Judge, dissenting). (A. 59-80).

The majority opinion specifically agreed with Plaintiffs that the challenged license fee ratio "...cannot be justified on any basis of cost allocation." (A. 62, 63). Nevertheless, the majority opinion held that the privileges and immunities clause is inapplicable; that the challenged classifications, not touching upon a fundamental right, should be reviewed on the "rational relationship" standard; and that the State of Montana could find reasonable basis for the statutory discrimination in the possibility that the political motivation of the Montana

---

[3]This statute was repealed on August 12, 1976, P.L. 94-381, 94th Cong., S. 357, but such repeal does not apply to any action commencing before that date.

citizenry to underwrite the elk management program might be destroyed if the discrimination were eliminated. (A. 68-72).

Judge Browning, in dissent, stated that the majority sustained the discrimination "...on a novel theory not suggested by the state or supported by any authority." (A. 75). He relied on Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974), and Cole v. Housing Authority, 435 F. 2d 807 (1st Cir., 1970), for the proposition that "A state may not employ an invidious discrimination to sustain the political viability of its programs. 415 U.S. at 266." (A. 77).

SUMMARY OF ARGUMENT

Montana's statutory scheme for big game hunting licenses violates Appellants' constitutional rights under the privileges and immunities clause (Article IV, Section 2) and the equal protection clause (Fourteenth Amendment) of the United States Constitution. Toomer v. Witsell, 334 U.S. 385 (1948), which held unconstitutional a South Carolina law which imposed drastically higher license fees on nonresident shrimpers than on resident shrimpers, is controlling here. Toomer established that a discrimination against citizens of other states is inconsistent with the privileges and immunities clause

where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other states.

The Toomer case and Mullaney v. Anderson, 342 U.S. 415 (1952), held that higher state licensing fees for nonresident commercial fishermen than for residents can be justified only to the extent that such fees merely compensate the state either for any added enforcement burdens imposed by nonresidents or for any conservation expenditures from taxes which only residents pay.

The license fee structure in Montana--particularly the "combination" license requirement whereby nonresidents but not residents must purchase a license for a combination of species--cannot be justified either on the basis that it merely compensates the state for the additional enforcement burden, if any, posed by nonresidents or on the basis that it merely represents nonresident contributions to the state to match tax contributions made by residents for conservation. Indeed, the District Court, in ruling against Plaintiffs, conceded that the Montana license fee structure could not be justified on any cost basis. The District Court held, however, that the privileges and immunities clause is inapplicable because sport hunting is not a

"fundamental" right and held the discrimination valid because, without such discrimination, political support for the game management program in Montana might disappear.

The District Court erred in holding Toomer v. Witsell, supra, inapplicable on the basis that commercial rather than recreational activities were involved. This Court has recently held that strict scrutiny of statutory classifications hinging on nonresidency is necessary because the individual's right to nondiscriminatory treatment is involved and because the structural balance essential to the concept of federalism is at stake. Austin v. New Hampshire, 420 U.S. 656, 43 L. Ed. 2d 530 (1975). The present case presents an even more compelling reason for strict scrutiny to preserve the structural balance of federalism because a substantial portion of big game hunting in Montana takes place on federal lands (e.g. 75% of the elk taken by hunters in Montana are taken on federal lands).

Furthermore, the District Court erred in rejecting Plaintiffs' equal protection contention on the grounds that the Montana license fee discrimination scheme could be justified as reasonable on the supposition that political support for the elk management

program might disappear in the absence of such discrimination. The justification of a discrimination against nonresidents on such political grounds carries dangerous implications. Under such a nefarious rationalization a state might be able to discriminate against Blacks in its public school system on the supposition that a white majority might vote to close down the public schools in the absence of such discrimination. A state may not employ an invidious discrimination to sustain the political viability of its programs. Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974).

In any case, there is no evidence on the record that political support for the game management program would evaporate in the absence of invidious discrimination against nonresidents. Thus, this rationale for the discrimination hinging on political grounds is nothing more than bald speculation on the part of two District Judges.

Furthermore, Montana's bizarre "combination" license, whereby nonresidents (but not residents) who desire to hunt elk only are compelled to purchase an assortment of other big game licenses, is so palpably capricious that it cannot be justified even under the rationale adopted by the District Court.

Finally, the ultimate holding of the

District Court--that a state may condition the right of the nonresident to hunt "upon such terms as it sees fit" is constitutionally indefensible. Such holding gives the State of Montana a "carte blanche" to develop further and even more egregious discriminatory devices aimed at restricting nonresident hunters. This holding cannot be squared with either the equal protection clause or the privileges and immunities clause. Nor can it reasonably be reconciled with the undisputed fact that a good part of the big game hunting activity in Montana is done on federal lands--lands owned by all of the people--not just the people of Montana.

ARGUMENT

I. THE MONTANA BIG GAME LICENSE FEE SYSTEM DENIES NONRESIDENTS THEIR CONSTITUTIONAL RIGHTS

A. MONTANA'S DISCRIMINATION AGAINST NONRESIDENTS VIOLATES THE PRIVILEGES AND IMMUNITIES CLAUSE

This case is governed by Toomer v. Witsell, 334 U.S. 385 (1948).[4] In Toomer, a South Carolina statute required nonresidents to pay a fee one hundred times greater than that paid by residents for a license to shrimp commercially in the three-mile maritime belt off the coast of that state. The South Carolina fishery was part of a larger fishery extending from North Carolina to Florida. The shrimp were migratory.

The Court found that the effect of the statute was virtually to exclude nonresidents. The South Carolina statute was

---

[4]It should be noted at the outset that two cases are pending before the Supreme Court which may have implications for the present case. Massachusetts v. Westcott, No. 75-1775, argued January 17, 1977; and, Douglas v. Seacoast Products, Inc., No. 75-1255, argued January 17, 1977.

declared unconstitutional under the privileges and immunities clause of the Constitution, Article IV, Section 2. The Court stated:

> (The privileges and immunities clause) does bar discrimination against citizens of other states where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. (P. 396).

The Toomer case was followed by Mullaney v. Anderson, 342 U.S. 415 (1952). In Mullaney, the Territorial Legislature of Alaska provided for the licensing of commercial fishermen in territorial waters, imposing a $5.00 license fee on resident fishermen and a $50.00 fee on nonresidents. The Supreme Court found the nonresident license fee invalid under the privileges and immunities clause, Article IV, Section 2. The Court cited with approval the holding in Toomer v. Witsell, that the state may only "charge nonresidents a differential which would merely compensate the State for any added enforcement burden they may impose or for any conservation expenditures from taxes which only residents pay." (At 417) (Emphasis added).

This standard, established by Toomer v. Witsell, supra, and reaffirmed in Mullaney

v. Anderson, supra,[5] is applicable to the present case. The additional burdens imposed on nonresident hunters by the State of Montana are only constitutionally valid to the extent that they either compensate

---

[5]Numerous lower Court cases have reached the same result based on the privileges and immunities clause. See Edwards v. Leaver, 102 F. Supp. 698 (D. R.I., 1952)(striking as violative of privileges and immunities clause a state statute limiting commercial fishing licenses to residents); Steed v. Dodgen, 85 F. Supp. 956 (W.D. Tex., 1949)(holding unconstitutional a Texas law which assessed drastically lower license fees for shrimpers who were Texas residents as opposed to nonresidents); Russo v. Reed, 93 F. Supp. 554 (D. Me., 1950)(striking down as a denial of privileges and immunities a Maine statute which prohibited nonresidents from commercially fishing in the Maine coastal waters in the summer months); Brown v. Anderson, 202 F. Supp. 96 (D. Alaska, 1962)(striking down an Alaska statute differentiating between residents and nonresidents in granting salmon fishing licenses); Gospodonovich v. Clements, 108 F. Supp. 234 (D. La., 1953).

the State for any added enforcement burdens imposed by the presence of nonresident hunters or reimburse Montana for any conservation expenditures from taxes which only residents pay.

In Toomer, South Carolina did attempt to justify the restrictions on nonresidents as a conservation measure. That it would curb excessive trawling, its putative purpose, seemed doubtful because the statute did not limit the number of resident boats. In any event, the Court rejected the proposition that any means can be adopted to attain valid objectives finding that such proposition overlooks the purpose of the clause, which is "to outlaw classifications based on the fact of non-citizenship unless there is something to indicate that noncitizens constitute a peculiar source of the evil at which the statute is aimed." 334 U.S. at 398.

South Carolina mentioned, but did not try to prove, that the fishing methods and size of boats of nonresidents, and the greater cost of enforcing laws against them, constituted a peculiar evil. The record did not bear this out. In any case, the state had other less drastic remedies--restricting types of equipment, basing fees on boat size or on the differential in enforcement costs. There was thus no

reasonable relationship between the putative dangers non-citizens posed and the severe discrimination visited upon them.

In the present case, the State of Montana has likewise attempted to justify the additional license fees and the combination license requirement for nonresidents by arguing that such devices are necessary to reimburse Montana for the extra cost of enforcement and for conservation expenditures from resident-borne taxes. The facts simply do not support this. Even the two-Judge majority, which ruled against Plaintiffs, conceded that, "with due regard to the presumption of constitutionality, we find that the ratio of 7.5 to 1 cannot be justified on any basis of cost allocation." (A. 62).[6]

In spite of the clear inability of the state to justify the discrimination on a reasonable basis of cost allocation, the District Court found Montana's license fee scheme constitutional. The District Court found Toomer v. Witsell and the line of cases associated with Toomer inapplicable because those cases involved commercial activities while the present case presents a recreational interest (which the District

---

[6]This factual ruling is correct. This issue is addressed later in this brief in Section III.

Court found not to be "fundamental") (A. 68).

The most recent interpretation by this Court of the privileges and immunities clause was in Austin v. New Hampshire, 420 U.S. 656, 43 L. Ed. 2d 530 (1975). Austin involved a New Hampshire tax which discriminated against nonresidents. This Court, recognizing the broad leeway traditionally accorded states in the formulation of classifications relating to taxes and impositions, nevertheless struck the tax down. The Austin case emphasized that, because of the paramount importance of the rights protected by the privileges and immunities clause, a rigorous standard of review would be appropriate:

> In resolving constitutional challenges to state tax measures this Court has made it clear that "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification." (Citing cases). Our review of tax classifications has generally been concomitantly narrow, therefore, to fit the broad discretion vested in the state legislatures. When a tax measure is challenged as an undue burden on an activity granted special constitutional recognition, however, the appropriate degree of inquiry is that necessary to protect the competing constitutional value from erosion. See Lehnhausen v. Lake Shore Auto Parts Co.,

supra, 410 U.S., at 359.

This consideration applies equally to the protection of individual liberties, see Grosjean v. American Press Co., 297 U.S. 233 (1936), and to the maintenance of our constitutional federalism. See Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 164 (1954). (Emphasis added). 420 U.S. at 661, 662.

The Court further said:

Since nonresidents are not represented in the taxing State's legislative halls, cf., Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 532-533 (1959) (BRENNAN, J., concurring), judicial acquiescense in taxation schemes that burden them particularly would remit them to such redress as they could secure through their own State; but "to prevent [retaliation] was one of the chief ends sought to be accomplished by the adoption of the Constitution." Travis v. Yale & Towne Mfg. Co., 252 U.S. 60, 80 (1920). Our prior cases, therefore, reflect an appropriately heightened concern for the integrity of the Privileges and Immunities Clause by erecting a standard of review substantially more rigorous than that applied to state tax distinctions among, say, forms of business organizations or different trades and professions. 420 U.S. at 662, 663. (Emphasis added).

Significantly absent from the Austin decision was any consideration of whether the Plaintiffs' activities were "fundamental" or otherwise. Rather, the focus is on the classification itself--i.e. the fact that the discrimination hinged on the fact of nonresidency.

This focus on nonresidency as a classification stems from the "special constitutional recognition" afforded the interest of proper "maintenance of our constitutional federalism." (420 U.S. at 662). Constitutional federalism relates both to the relations of the states with the national government and to the relations of the states with one another.

Against this policy backdrop underlying the privilege and immunities clause the following undisputed facts should be considered:

1. A significant portion of the elk habitat in Montana is on Federal lands. (A. 57).
2. Eighty-five percent (85%) of the bear taken in Montana are taken on Federal lands. (A. 57).
3. Seventy-five percent (75%) of the elk taken in Montana are taken on Federal lands. (A. 57).
4. The United States contributes

> a significant number of tax dollars to the State of Montana for fish and wildlife purposes--e.g. $1,105,387.00 in 1973 for wildlife habitat acquisition under the Pittman-Robertson Act, 16 U.S.C. 669, et seq. (Plaintiffs' Exhibit 6). Second only to license fees, the largest source of funds for the Montana Fish and Game Department is the Federal government. (Table VII, Report of the Wildlife Management Institute, 1971, Plaintiffs' Exhibit 6).

It simply cannot be said, under our system of constitutional federalism, where the national government makes such a significant contribution to the wildlife resource in Montana, that Montana is wholly free to condition the rights of nonresidents to hunt on whatever terms it sees fit. Yet, the District Court has so ruled--on the basis that the interests involved are recreational, not commercial, and therefore not important or significant enough to require anything but the most passing review.

The "Report to the President and to the Congress by the Public Land Law Review Commission--One Third of the Nation's Land,

June, 1970", states:

> All citizens share a common heritage in the public lands, just as they bear the common burden of maintaining, protecting, and developing these properties through their Federal tax dollars. No one should be granted a cost advantage to hunt and fish on public lands due solely to his place of residence. (P. 174) (Emphasis added).

Like Austin, the Toomer case is devoid of discussion relating to whether the interests involved were "fundamental" or otherwise. The Toomer Court emphasized the nature of the classification and whether such classification was important to accomplish the putative state purpose of conservation. The Toomer Court set forth the policy underlying the privileges and immunities clause as follows:

> The primary purpose of this clause, like the clauses between which it is located--those relating to full faith and credit and to interstate extradition of fugitives from justice--was to help fuse into one Nation a collection of independent sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy. For protection of such equality the citizen of State A was not

restricted to the uncertain remedies afforded by diplomatic processes and official retaliation.

> "Indeed, without some provision of the kind removing from the citizens of each state the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those states, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists." Paul v. Virginia, 8 Wall. 168, 180 (1868).

334 U.S. at 395.

This policy consideration applies to the present discriminatory practice of Montana against nonresidents. The report of the Wildlife Management Institute (1971) (Plaintiffs' Exhibit 7), states:

> Outdoor recreational uses are increasing dramatically, and there is greater tendency to restrict the nonresident as the competition for space and resource becomes more acute. Strangely enough, this reaction often is more apparent in the States having large expanses of public land, scenery, and wildlife. People who choose to reside in such States obviously relish freedom from crowding. They are possessive about abundant opportunities to hunt and fish, and they make no effort to disguise

> their dislike of nonresident sportsmen, particularly hunters. As a result, they tend to favor controlling the nonresident by imposing higher fees and quotas long before they will accept more controls over themselves. Politically, it is always easier to impose added costs and new restrictions on nonresidents because they have no voice or vote within a particular state. (pp. 12, 13). (Emphasis added).

Thus, the very values the Framers intended to protect through the privileges and immunities clause--comity among the States and a reasonably balanced federal system--are threatened by such discriminatory practices against the nonresident. The nonresident has little recourse to the voting booth or the legislative halls of Montana. Heightened scrutiny by this Court is, therefore, necessary in order to insure that constitutional values implicit in the federal system are not eroded.

The rejection by the District Court of the privileges and immunities clause, the employment by that Court of a "minimal scrutiny" test in reviewing the classifications, and particularly the reliance by the Court on the supposition that political support for game management might disappear in Montana, has resulted in a decision which is fundamentally inconsistent

with the values underlying our basic federal system. Under the District Court's ruling, Montana can condition hunting on any "terms it sees fit." This is literally an invitation to the states to close their doors to nonresidents. Rather than attempt to arrive at a reasonable constitutional solution to the problem at hand, the District Court ignored the policy behind the privileges and immunities clause and openly ruled that a state can do anything it wants regarding nonresident hunters because recreational hunting is not a "fundamental" right. The corrosive implications of that decision should not be left to stand.

The essence of the Toomer decision is that a state may not visit additional burdens upon nonresidents unless substantial reasons exist therefor. The application of Toomer cannot be avoided by focusing on the nature of the activity involved rather than the nature of the classification.

Furthermore, two state cases, one from Montana, have found classifications based on nonresidency unconstitutional when the activity involved was sport hunting rather than commercial activity. While both cases were decided on equal protection grounds rather than on privileges and immunities grounds, they nevertheless relate to the issue here. In

State v. Jack, 539 P. 2d 726 (Mont., 1975), Montana's law requiring nonresident hunters to employ local guides while hunting in Montana was found violative of the equal protection clause. In Schakel v. State, 513 P. 2d 412 (Wyo., 1973), a similar Wyoming statute was ruled unconstitutional.

For these reasons, the Montana hunting license scheme violates the privileges and immunities clause of the United States Constitution.

B. THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT FORBIDS THE KIND OF ARBITRARY AND INVIDIOUS DISCRIMINATION IMPLICIT IN THE MONTANA STATUTORY SCHEME

In addition to violating the privileges and immunities clause, the Montana hunting license scheme violates the equal protection clause of the Fourteenth Amendment to the United States Constitution.

Both the nonresident big game combination license complained of and the drastically-higher license fees for nonresident hunters here in question, serve to establish two classes of hunters. The distinction between the two classes is based solely on citizenship (residency).

The practical effect of the creation of these two classes is that one class (nonresidents) is severely penalized

vis-a-vis the other class.

It is well established that the equal protection clause applies to the states in the exercise of their police powers relating to fish and game management. Takahaski v. Fish and Game Comm'n, 334 U.S. 410 (1948), established that almost thirty years ago. As noted above, the recent decisions of the Montana and Wyoming Supreme Courts have applied the Federal equal protection clause to the regulation by those states of certain aspects of recreational hunting. State v. Jack, 539 P. 2d 726 (Mont., 1975); Schakel v. State, 513 P. 2d 413 (Wyo., 1973).

The Montana Supreme Court said in State v. Jack:

> ...The statute purports to promote adherence to the game laws and respect for the environment, but no reasonable connection has been established between this goal and the legislative classification. Even assuming the existence of such a connection, its relationship to this particular purpose becomes more remote when applied to former Montana residents and non-resident land owners as defendant.(539 P. 2d at 730.)

In like manner, the state's proffered justifications of the nonresident combination license, which are discussed below, have either no connection or a connection so

remote to a legitimate governmental objective as to be wholly arbitrary and a denial of equal protection.[7]

Given the established proposition that the state's power to classify under its game laws is limited by the equal protection clause, the question becomes--what standard of review should be employed?

Strict scrutiny by this Court of the residence-based classification here involved is fully justified by this Court on two bases: (1) Important individual liberties and principles basic "to the maintenance of our constitutional federalism are involved." See, Austin v. New Hampshire, supra, 420 U.S. at 662; and, (2) Considerations much like those that have compelled the courts to declare certain other classifications

---

[7]Other Courts have also applied the equal protection clause to the regulation by the states of their fish and game activities. See Pavel v. Pattison, 24 F. Supp. 915 (W.D. La., 1938)(voiding a state statute which discriminated against a nonresident's right to trap upon his land as violative of the equal protection clause); Pavel v. Richard, 28 F. Supp. 992 (W.D. La., 1928)(voiding a state statute requiring higher trapper's license fees as denying equal protection to nonresidents); Massey v. Appolonio, 387 F. Supp. 373 (D. Me., 1974).

"suspect" are in issue. Just as race is a classification on which legislators have found it easy to draw gross, stereotypical distinctions, so too is the fact of nonresidence.[8] Nonresidents simply have no political control to curb abuses against them by state legislatures. Nonresidents have consistently been saddled by states with disabilities similar to Montana's restrictive licensing scheme. They are relegated to a position of political powerlessness to such a degree that they command extraordinary protection from the majoritarian political process. See Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976).

In any case, it is unnecessary to fit the present classification into any rigid category in order to trigger meaningful judicial review under the equal protection clause.[9] In the 1971 term, this Court

---

[8]Cf. Grozier, "Constitutionality of Discrimination Based on Sex", 15 Boston U. L. Rev. 723, 728.

[9]See, Gunther, "In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection", 86 Harv.L. R. 1. (November, 1972).

invoked the equal protection clause to void state legislation in six important cases without employing the "strict scrutiny" analysis. Reed v. Reed, 404 U.S. 71 (1971); Eisenstadt v. Baird, 405 U.S. 438 (1972); James v. Strange, 407 U.S. 465 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); Humphrey v. Cady, 405 U.S. 504 (1972); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972).

More recently, other legislative classifications have been found inconsistent with equal protection of the laws without resort to the "strict scrutiny" test. Weinberger v. Wiesenfeld, 420 U.S. 636 (1973); Stanton v. Stanton, 421 U.S. 7 (1975); Califana v. Goldfarb, No. 75-699, 45 U.S.L.W. 4237, March 1, 1977. (See also, dissent of Justice Brennan in Massachusetts Board of Retirement v. Murgia, 427 U.S. at 313, 319).

It should be noted that the "special public interest" theory sometimes advanced to justify state discrimination in favor of its own citizens in matters of "privilege" as distinguished from "right", has been soundly rejected by this Court. See Sugarman v. Dougall, 413 U.S. 634, 643-45 (1973); Graham v. Richardson, 403 U.S. 365 (1970).

Thus, regardless of whether sport hunting is a fundamental right and regardless of whether Montana's discrimination

against nonresidents is akin to the suspect classification doctrine, meaningful review of the classification is warranted and, if the classification is to be sustained, it should be clear that the classification is reasonably related and reasonably tailored to a legitimate state purpose. Sugarman v. Dougall, 413 U.S. 634 (1973). Certainly, the present case does not qualify for an extremely deferential, minimal standard of rationality which the Court has sometimes used to test legislation that discriminates against business interests, e.g. Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

The District Court majority in fact found the Montana statutory scheme indefensible on any basis of cost allocation (which was the theory upon which Montana attempted to justify the scheme). Instead, the District Court found some rationality underlying the statute on the basis that political support for the program may evaporate in the absence of the discrimination against nonresidents. This was an improper justification under the equal protection clause and one which, if allowed to stand, could have extremely dangerous implications for the broad spectrum of cases which are decided under the equal protection clause. The political justification relied upon by

the majority below is discussed more fully in Section II of this brief.

For the foregoing reasons and for the reasons discussed in Section II, it is submitted that the Montana statutory scheme dealing with nonresident hunting violates the equal protection clause as well as the privileges and immunities clause.

C. WHATEVER THE CONTEMPORARY VALIDITY OF THE LEGAL FICTION OF OWNERSHIP OF THE GAME BY THE STATE, IT DOES NOT ABSOLVE THE STATE FROM ACTING WITHIN THE UNITED STATES CONSTITUTION

Montana argued below that it was the "owner" of the game within its borders and that therefore it was free to regulate the game as it saw fit. The Plaintiffs took the position that the "ownership" theory relating to wildlife is virtually dead and that the state's regulation of wildlife within its borders is more properly viewed as a state police power. The District Court refused to choose between the two theories finding such choice unnecessary to its holding. (A. 66).

Montana placed primary reliance on McCready v. Virginia, 94 U.S. 391 (1876) and Geer v. Connecticut, 161 U.S. 519

(1896).[10] In McCready, the Court upheld a Virginia statute prohibiting citizens of other states from planting oysters in Virginia's tidewaters. The Court declared that the state owned both the tidewaters and "the fish in them so far as they are capable of ownership while running." Accordingly, Virginia could regulate the planting or taking of oysters in those tidewaters, even to the point of excluding altogether the citizens of other states, because such a regulation "is in effect nothing more than a regulation of the use by the people of their common property." (At 395).

In Geer v. Connecticut, a defendant appealed his conviction under state law for possessing game birds with the intent to ship them out of Connecticut. The birds had been lawfully killed in Connecticut--only Geer's intent to transport them outside the state was unlawful. Geer challenged the Connecticut law as an infringement on interstate commerce. The Court upheld the Connecticut statute, concluding that the state had the "right

---

[10] See generally Bean, "Law & Wildlife: An Emerging Body of Environmental Law", 7 E.L.R. 50013 (March, 1977).

to control and regulate the common property in game", which right was to be exercised "as a trust for the benefit of the people." The Court held that, as an incident to the right of control, the states could affix conditions on the taking of game. The Geer opinion, because of the broad generality of its language, came to be regarded as the bulwark of the state ownership doctrine.[11] Yet, the Geer opinion itself recognizes that state ownership power exists only "insofar as its exercise may not be incompatible with, or restrained by, the rights conveyed to the Federal government by the Constitution." (161 U.S. at 528).

Taken to its extreme, as the State of Montana would try to take it, the ownership doctrine would preclude interference with state management of wildlife even where federal constitutional rights are involved. Such extension would also preclude the development of a substantial body of federal wildlife law. Yet, only four years after Geer, federal wildlife law took its first major step with passage of the

---

[11] Id. at 50015.

Lacey Act of 1900.[12]

The state ownership doctrine suffered a severe setback in 1920 with the Court's landmark decision in Missouri v. Holland, 252 U.S. 416 (1920). In that case, the state of Missouri sought to restrain the United States from enforcing the Migratory Bird Treaty Act.[13] The Act in question was part of a Treaty between the United States and Great Britain (Canada) for the protection of migratory birds. The United States contended that the Treaty and its implementing legislation took precedence over any conficting state power of regulation. The Court, through Justice Holmes, disposed of Missouri's ownership argument in the following terms:

> The State...founds its claim of exclusive authority upon an assertion of title.... No doubt it is true that as between a State and its inhabitants, the State may regulate the killing and sale of such birds,

---

[12] Ch. 553, 31 Stat. 187 (now codified in 18 U.S.C. §§42-44, and 16 U.S.C. §§667e and 701 (1970). See also, Bean, supra, at 50015.

[13] Ch. 128, 40 Stat. 755 (1918) (now codified in 16 U.S.C. §§703-711 [1970) as amended (Supp. IV, 1974).

> but it does not follow that its authority is exclusive of paramount powers. To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone, and possession is the beginning of ownership.... (252 U.S. at 434-35).

Montana's claim to ownership of big game sometimes found within its borders is likewise based upon a slender reed. The District Court found that, "the elk is migratory in the sense that it moves from the summer range to the winter range and back, and when this sort of migration occurs near the borders of Montana, the elk drift to and from Montana, Idaho, Wyoming, and Canada." (A. 59). (See, Tr. 31).

In Takahashi v. Fish and Game Comm'n, supra, California attempted to justify its restriction against aliens fishing in its marginal sea on the basis of the ownership doctrine. The Takahashi Court found the language from Missouri v. Holland, applicable, stating:

> To whatever extent the fish in the three-mile belt off California may be "capable of ownership" by California, we think that "ownership" is

> inadequate to justify California in excluding any or all aliens who are lawful residents of the state from making a living by fishing in the ocean off its shores while permitting all others to do so. (334 U.S. at 421).

Likewise, in Toomer v. Witsell, supra, the state of South Carolina attempted to justify its discrimination against non-resident shrimpers on the ownership doctrine. That attempt was also rejected by the Supreme Court which stated:

> The whole ownership theory, in fact, is now generally regarded as a fiction expressive in legal shorthand of the importance to its people that a state have powers to preserve and regulate the exploitation of an important resource. And there is no necessary conflict between that vital policy consideration and the constitutional command that the state exercise that power, like its other powers, so as not to discriminate without reason against citizens of other states. (334 U.S. at 402).

While these cases do not explicitly overrule McCready v. Virginia, it is clear that "the ownership theory was put to rest" by Toomer v. Witsell. Brown v. Anderson, 202 F. Supp. 96, 102 (D. Ala., 1962).

The Toomer case and the Takahaski case are squarely applicable to the present case because they both involve

attempts by states to justify deprivations of individual constitutional rights on the basis of the ownership doctrine. In both cases, the exercise of the state regulatory power over wildlife was found subject to constitutional limitations.

More recently, this Court faced a constitutional challenge to the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§1331-1340, as amended (Supp. IV)(1971) in Kleppe v. New Mexico, 426 U.S. 529 (1976). The Court said:

> Appellees' contention that the Act violates traditional state power over wild animals stands on no different footing. Unquestionably, the states have broad trustee and police powers over wild animals within their jurisdictions. Toomer v. Witsell, 334 U.S. 385, 402 (1948); Lacoste v. Department of Conservation, 263 U.S. 545, 549 (1924); Geer v. Connecticut, 161 U.S. 519, 528 (1896). But as Geer v. Connecticut cautions, those powers exist only "insofar as their exercise may not be incompatible with, or restrained by, the rights conveyed to the federal government by the constitution." 161 U.S. at 528. No doubt it is true that as between a state and its inhabitants the state may regulate the killing and sale of [wildlife] but it does not follow that its authority is exclusive of paramount powers. Missouri v. Holland, 252 U.S. 416, 434 (1920). Thus, the privileges

> and immunities clause, U.S. Const., Art. IV, Sec. 2, Cl. 1, precludes a state from imposing prohibitory license fees on nonresidents shrimping in its waters. Toomer v. Witsell, supra;.... (426 U.S. at 545).

A state does have important interests in regulating wildlife within its borders. The antiquated "ownership" doctrine however, is an inappropriate device by which to describe these state interests. The state interest in its wildlife is simply part of the general police power of the state. It has been established since Toomer and Takahashi that, whatever one chooses to call the states' interests in regulating their game, such interests may not be exercised in contravention of the United States Constitution.

The Montana case law recognizes that the state's exercise of its power over wildlife is subject to constitutional limitations. Rosenfeld v. Jackways, 67 Mont. 558; State ex rel. Visser v. Fish and Game Comm'n., 150 Mont. 525.

It is clear that the "ownership" doctrine cannot be employed to escape the application of the privileges and immunities clause and the equal protection clause of the United States Constitution.

II. THE MONTANA STATUTORY SCHEME WHICH IMPOSES SUBSTANTIAL BURDENS (FINANCIAL AND OTHERWISE) ON NONRESIDENT HUNTERS CANNOT BE JUSTIFIED CONSTITUTIONALLY ON THE BASIS THAT POLITICAL SUPPORT OF THE LOCAL CITIZENRY MAY EVAPORATE IN THE ABSENCE OF DISCRIMINATION AGAINST NONRESIDENTS

The District Court conceded that the Montana licensing scheme cannot be justified on any basis of "cost allocation." The Court, nevertheless, sustained the discrimination on the following basis:

> The State purpose is to restrict the number of hunter days. Any regulatory system which imposes a license fee in some sense discriminates against those who can't afford to pay it. As the fee increases, the discrimination increases. A regulatory scheme based upon a pure lottery in which a limited number of hunters were chosen would be discrimination-free, but a legislature might with some rationality conclude that a pure lottery open to all potential elk hunters in the United States might destroy the political motivation to Montana citizens to underwrite the elk management program in the absence of which the species would disappear. (A. 70-71).

Contrary to the implication carried in

the above statement by the District Court, a "pure lottery" system to select hunters is not the only alternative to the present Montana system. Appellants have never argued that Montana cannot charge a higher license fee for nonresidents. The position of Appellants is that an additional fee may be charged nonresidents to the extent that the differential can be justified on the basis of additional enforcement costs posed by nonresidents and/or reimbursement to the state for conservation expenditures paid for through taxes borne only by the citizens of the state. The overly simplistic analysis of the District Court suggests that either Montana be wholly unlimited in its ability to restrict nonresidents or that the only alternative is a national lottery system. A constitutional solution can be achieved without resorting to a "pure lottery" and its attendant consequences.

It also should be noted that Montana's "combination" license requirement which applies only to nonresidents is not separately addressed by the District Court. Even if Montana needs a device to restrict hunters, and even if it is allowable to charge nonresidents such a high fee that many cannot afford it, it does not follow that the "combination" license--i.e. the

placing of ancillary burdens on nonresidents--is a constitutionally acceptable way of achieving the goal of restricting the number of hunters.[14]

The most important fault in the analysis of the District Court, however, is its reliance on the supposition that political support for the game program might disappear in the absence of the discrimination against nonresidents. For the reasons discussed below, such basis cannot legitimately be used to justify the discrimination.

A. POLITICAL FACTORS CANNOT BE EMPLOYED TO RATIONALIZE AN OTHERWISE UNJUSTIFIABLE DISCRIMINATION

Judge Browning, in dissent, characterizes the majority's holding as follows:

> ...A state may justify the constitutionality of a discriminatory statute by showing that political support by the class of people to be benefited by the discrimination is necessary in order to continue the program that benefits them. (A. 77).

The dissent notes that the majority found factually untenable the state's

---

[14]The issues relating to the combination license are addressed specifically in Section III of this brief.

attempt to justify the discrimination on a basis of cost allocation and states further:

> The majority does not discuss the other purposes advanced by the state to support the discrimination--implying (and I agree) that there is no reasonable relationship between the discriminatory license fee and any of the other purposes advanced by the state. Each such justification is shown by the record to be either logically or factually unsupportable. (A. 74, 75).

Thus, the question is, can a discrimination, which is not reasonably justifiable on any other grounds, nevertheless be found reasonable on the basis that state political support for the program may disappear if the discrimination is eliminated?

Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974), involved a constitutional challenge to an Arizona statute requiring a year's residence as a condition to an indigent receiving non-emergency medical care at county expense. In that case the Court rejected an attempt to justify the discrimination on political grounds:

> Appellees express a concern that the threat of an influx of indigents would discourage "the development of modern and effective [public medical] facilities." It is suggested that whether or not the durational residence requirement actually deters migration, the voters think that it protects them from low income families being attracted by the county hospital; hence the requirement is necessary for public support of that medical facility. (415 U.S. at 266).

The Court rejected this attempt to justify the discrimination stating, "[t]he state may not employ an invidious discrimination to sustain the political viability of its programs." 415 U.S. at 266 (Emphasis added).

The Supreme Court cited with approval Cole v. Housing Authority, 435 F. 2d 807, 812-813 (1st Cir., 1970), invalidating a city's durational residency requirement for access to low-income housing projects. In Cole, the city argued that the durational residency requirement was "often the key to survival of [public] housing" because voters believed such a restriction discouraged low-income nonresidents from migrating into the area. The Court of Appeals rejected this reasoning, stating, "[t]he objective of achieving political support by discriminatory means...is not one which the constitution recognizes." 435 F. 2d at 813.

Although Memorial Hospital and Cole involved infringement of fundamental rights, they are nevertheless applicable here. Both cases rejected justification of discrimination on political grounds because justification on such a basis is inherently inappropriate, not because the right infringed was fundamental.

The implications of the majority's finding are aptly summarized by Judge Browning in dissent:

> A holding that discrimination by the state may be justified by showing that the state could rationally believe such discrimination was necessary to secure political support for a program in the public interest, would lead inevitably, if indirectly, to the conclusion that invidious discrimination can be justified by popular disapproval of equal treatment. As the court said in Cole, such a rule "would rationalize discriminatory classifications which are constitutionally impermissible." 435 F. 2d at 812 (A. 78, 79).

The Supreme Court has rejected this kind of political justification for invidious classifications. In Memorial Hospital, the Court said:

> As we observed in Shapiro [v. Thompson]... "[p]erhaps Congress could induce wider state participation in school

> construction if it authorized the use of joint funds for the building of segregated schools," but that purpose would not sustain such a scheme. See also Cole v. Housing Authority of the City of Newport, 435 F. 2d 807, 812-813 (Ca. 1, 1970). (415 U.S. at 267).

In Griffin v. County School Board, 377 U.S. 218 (1964), a county in Virginia attempted to close down the public schools in order to avoid compliance with the desegregation decisions. The Court found this attempt to close down the schools inconsistent with the Fourteenth Amendment, stating:

> ...The record in the present case could not be clearer that Prince Edward's public schools were closed and private schools operated in their place with state and county assistance, for one reason, and one reason only, to ensure, through measures taken by the county and the state, that white and colored children in Prince Edward County would not, under any circumstances, go to the same school. Whatever nonracial grounds might support a state's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional.

Although the Griffin case differs factually from the present case, it has application. It demonstrates that the political

threat of the local citizenry to close down entirely public services cannot be used as a lever to avoid compliance with the Constitution. The implications of the District Court's rationale, when applied to the Griffin situation demonstrate the unsoundness of that approach. By the District Court's rationale desegregation might have been avoided in the southern states in the 1960's because the threat of the white majority to close the public schools could have served as sufficient justification for the discrimination. See Cooper v. Aaron, 358 U.S. 1.

In Palmer v. Thompson, 403 U.S. 217 (1971), the Supreme Court upheld the closure of city swimming pools in Jackson, Mississippi, finding the closure to be facially neutral (i.e. not clearly in response to decisions ordering desegregation of the swimming pools, but supported rather by fiscal reasons). Implicit in the Court's reasoning was the proposition that the majority will cannot abrogate the constitutional rights of citizens. The Court stated:

> Citizens may not be compelled to forgo their constitutional rights because officials fear public hostility or desire to save money. Buchanan v. Warley, 245 U.S. 60...; Cooper v. Aaron, 358 U.S. 1...; Watson v. City of Memphis, 373 U.S. 526 (1963). (403 U.S. at 226).

The ruling of the District Court in the present case is contrary to the important principle that constitutional rights are not subject to abrogation by majority will. As the Court said in West Virginia Board of Education v. Barnette 319 U.S. 624, (1942):

> The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. (319 U.S. at 638).

See also, Lucas v. Colorado General Assembly, 377 U.S. 713, 736 (1963).

One of the disturbing consequences of the majority's ruling is that it appears impossible to limit. If political support is cognizable as a factor upon which discriminatory legislation can be found reasonable, many invidious discriminations will be allowed to stand. In Brown v. Anderson, 202 F. Supp. 96 (D. Alaska, 1962), the Court faced a challenge to an Alaska statute which allowed a state commission to close off certain waters to nonresident salmon fishermen if it appeared that there would not be adequate salmon in such waters to perpetuate the population. The state argued that the provision was reasonable in that it would possibly prevent the destitution of

residents (should the salmon fishery become depleted). Alaska argued such residents would become "a burden upon the citizens of Alaska and not on nonresidents." (202 F. Supp. at 101, 102).

The Court rejected such argument recognizing the open-ended implications inherent in such rationale:

> There is no exception in the privileges and immunities clause providing for differentiation on the basis of the general welfare of citizens of any State. If such were the case it would be possible to couch a legislative Act in such words as to regulate almost all types of endeavor on the sole basis of welfare. We cannot agree with defendants that there is any authority to avoid the effect of the privileges and immunities clause solely under the guise of avoiding economic losses to residents. The Act cannot be sustained on the basis that this is a reasonable basis for difference in application. (Id. at 102).

This is similar to the political justifications relied upon by the District Court. Virtually any discrimination could be couched in such terms that it would appear that local political support for the program would diminish in the absence of such discrimination.

The present case is a good example of the problems implicit in the District Court's analysis. It may well be popular to exclude

or severely restrict nonresident hunters from Montana. And it may be politically unpopular not to do so. Nonresidents have no influence in the State Legislature so protection of their rights through the democratic process is not possible. Yet, the very democratic process which has discriminated against the nonresident serves as the constitutional rationalization in a Court of law to justify denial of constitutional relief.

This rationale is inconsistent with the fundamental goal of our Constitution to protect minority rights. For this reason, the District Court's judgment must be reversed.

B. THERE IS NO EVIDENCE THAT POLITICAL SUPPORT FOR THE GAME PROGRAM WOULD EVAPORATE IF THE DISCRIMINATION AGAINST NONRESIDENTS IS ELIMINATED. IN THE ABSENCE OF SUCH EVIDENCE THE DISTRICT COURT'S SPECULATION IS UNWARRANTED

Aside from the impropriety of the District Court's use of political support factors to justify the discrimination, the District Court improperly speculated that political support in Montana for the game program would disappear in the absence of discrimination against nonresidents.

The District Court concluded that a legislature "might with some rationality,

conclude that a pure lottery open to all potential elk hunters in the United States might destroy the political motivation to Montana citizens to underwrite the elk management program..." (A. 70) (Emphasis added). There was no evidence to support this supposition. Indeed, the state, in support of the challenged classifications, did not advance the theory embraced by the majority so it is not surprising that the record is barren of any evidence upon which to base such theory. As Judge Browning states in dissent:

> The majority nonetheless sustains the discrimination on a novel theory not suggested by the State or supported by any authority. (A. 75).

There are many cases in which there is clear evidence that there will be political resistance and perhaps even violence, in response to unpopular judicial decisions vindicating individual rights. This Court has firmly held that the constitutional rights of individuals may not be abrogated because unpopular with the majority. See Cooper v. Aaron, supra, p. 48. Clearly where the evidence of popular reaction is less clear, a Court cannot be allowed to speculate as to the unpopularity of a potential constitutional decision and, once it supposes that such decision will be unpopular, refuse

to make it.

Watson v. City of Memphis, 373 U.S. 526 (1963), was a desegregation case in which the defendant argued that implementation of the decision would result in tumultuous behavior and difficulty of enforcement. In rejecting such argument as a ground to avoid compliance with the Constitution, the Court pointed to the state of the record on the issue, indicating that it would not readily infer (in the absence of evidence) problems with enforcement:

> Beyond this, however, neither the asserted fears of violence and tumult nor the asserted inability to preserve the peace was demonstrated at trial to be anything more than personal speculations or vague disquietudes of city officials. There is no indication that there has been any violence or meaningful disturbances when other recreational facilities had been desegregated. In fact, the only evidence in the record was that such prior transitions had been peaceful....
>
> . . . .
>
> Moreover, there was no factual evidence to support the bare testimonial speculation that authorities would be unable to cope successfully with any problems which in fact might arise or to meet the need for additional protection should the occasion demand.
>
> . . . .

> More significantly, however, it is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them. We will not assume that the citizens of Memphis accept the questionable premise implicit in this argument or that either the resources of the city are inadequate, or its government unresponsive, to the needs of any of its citizens. 373 U.S. at 536-538.

Thus, the Watson case rejected as improper any reliance on factors relating to reaction of a political constituency in deciding issues involving individual constitutional rights. Apart from that however, the Watson opinion makes it very clear that a Court, in the absence of evidence, will not assume that a political reaction will be adverse and act accordingly. That is precisely what the District Court did in the present case. It speculated in an evidentiary vacuum that the Montana citizenry might refuse to support the game management program in the absence of discrimination against nonresidents.

Because the District Court rationalized the discrimination on improper factors and because there is no evidence to support the District Court's bald supposition that political support for the game management program

would evaporate in the absence of discrimination against nonresidents, the District Court's decision should be reversed.

III. THE MONTANA STATUTORY SCHEME WHICH DISCRIMINATES AGAINST NONRESIDENTS CANNOT BE JUSTIFIED ON ANY OF THE FACTS OR GROUNDS ASSERTED BY THE STATE

The District Court rejected the grounds advanced by Montana to justify the statutory hunting license scheme as either factually or logically untenable. Although the District Court was correct in that ultimate conclusion, that Court failed to address the separate issue of the constitutionality of the requirement that nonresidents, but not residents, purchase a combination license. That requirement is arbitrary and, at best, bears only a tangential relationship to game conservation. The combination license issue and the license fee differential issue are addressed below.

A. MONTANA'S IMPOSITION OF THE COMBINATION LICENSE ON NONRESIDENT HUNTERS, BUT NOT ON RESIDENT HUNTERS, CONSTITUTES A CLASSIFICATION BASED ON CITIZENSHIP AND IS UNJUSTIFIED, ARBITRARY, AND INVIDIOUS

The nonresident Plaintiffs have hunted in Montana and desire to continue to hunt in Montana. (Depos. of Lee, pp. 1-6; depos.

of Moris, pp. 4-8). They desire to hunt essentially, and almost solely, for elk. (Id.) The outfitter Plaintiff, Lester Baldwin, makes his living guiding hunters (primarily nonresidents [Tr. 141]), essentially for elk. (Tr. 142).

In order for a nonresident to hunt elk in Montana, he must first purchase a nonresident "combination" big game license.[15] In 1975, that combination license entitled the nonresident to take one elk and two deer (deer "A" tag and deer "B" tag).[16] Effective May 1, 1976, the combination license entitled the nonresident to take one elk, one deer, and one black bear.[17]

If the nonresident wishes to hunt for elk only, he nevertheless must purchase the combination license (priced at $151.00 in 1975; $225.00 presently). The resident who wishes to hunt for elk only can purchase a single license for one elk[18] (priced at $3.00 in 1975; $8.00 presently).

---

[15] Section 26-202.1 [12], R.C.M., 1947.

[16] Section 26-202.1, R.C.M., 1947.

[17] Section 26-202.1 [12], R.C.M., 1947.

[18] Subject to first purchasing a conservation license for $1.00.

Thus, a classification is established by the Montana statutory scheme based on citizenship. The resident is afforded the choice of purchasing a single license for each species he wishes to hunt while the nonresident is denied that choice. There can be no doubt that this classification results in adverse economic discrimination against the nonresident hunters.

One obvious discriminatory effect is that the nonresident is compelled to pay a larger fee to cover the license for species he does not want. For instance, in the 1973 season when nonresidents were not compelled to purchase the black bear license, only 730 nonresident black and brown bear licenses were purchased. (Tr. 27). That same year, there were 19,277 nonresident combination big game licenses (elk and deer) purchased. (Tr. 28).

Yet, as the law now stands, the nonresident who wishes to hunt elk must purchase the combination license which includes black bear.

The requirement that the nonresident big game hunter purchase a combination license which includes black bear is ludicrous in light of the fact that "...the bear are usually hibernated during the regular season." (Tr. 296).

Moreover, the requirement that nonresidents purchase the combination license unconscionably fosters the wasting of game. The evidence indicates that some nonresidents, while hunting in Montana, come upon game for which they are not hunting but will shoot such game anyway, because they were forced to buy a license for such game. (Tr. 143, 144). This practice hardly comports with the goal of conserving game.

Under both the privileges and immunities clause of Article IV, Section 2 and the equal protection clause, this discriminatory classification must fall unless the classification can be justified by compelling state interests, or, at least legitimate and reasonable state interests. Therefore, the analysis must focus on what state interests, if any, are served by the classification.

Contrary to the District Court's finding that "the state purpose is to restrict the number of hunter days", the state offered numerous other justifications for the imposition of the "combination license" on nonresidents only. These reasons are summarized as follows:

1. The nonresident combination license tends to reduce the number of illegal kills. (Tr. 255).

2. Montana has a law making outfitters equally responsible for game violations of their clients; nonresidents use the services of outfitters to a greater extent than do residents; the combination license reduces the exposure of outfitters to game violations. (Tr. 239, 240).
3. The nonresident has a greater temptation than the resident to shoot game for which he does not have a license; therefore, the combination license allows him to bow to such temptation without breaking the law. (Tr. 8).
4. Nonresidents tend to engage in illegal license "pooling." The combination license frustrates that practice. (Tr. 237, 238).
5. Nonresident hunters want the combination license. (Tr. 290, 307).
6. Most residents who buy an elk license also buy some other license, therefore most residents voluntarily buy some form of combination license in any case. (Tr.394).

These offered justifications by the State of Montana are specious. For the most part they fail entirely to serve as a

reasonable basis for distinguishing between the resident and the nonresident. Aside from that, they are either factually or logically untenable. They are considered seriatim below:

(1) Whether the assertion that the combination license reduces the number of illegal kills can serve to justify the nonresident combination license

Montana argued that the requirement of the combination license reduces the number of illegal kills of game. (Tr. 255):

> Q. [Goetz] In other words, since the nonresident has a variety of licenses, if he kills a deer, for instance, he will have that license?
>
> A. [Lewis][19] Yes.
>
> . . .
>
> Q. [Goetz] So it wouldn't be an illegal kill?
>
> A. [Lewis] That's true.
>
> (Tr. 255, 256).

Obviously, if the same combination license were required of residents, it would further serve to reduce the number of illegal kills. (Tr. 256). Furthermore, if other species were added to the combination license, and the license were required, it would serve

[19]Official of the Montana Department of Fish and Game.

even more to reduce the number of illegal kills.

> Q. [Goetz] Now I assume you would also admit if you added moose to the combination license, that would reduce the number of illegal kills in Montana? (Emphasis added).
>
> A. [Lewis] That's true.
>
> Q. [Goetz] That goes both for the nonresident and the resident?
>
> A. [Lewis] Yes.
>
> (Tr. 256).

This reasoning, of course, can be carried on ad absurdum until all illegal game actively becomes legal through licensing for the activity and the only need for law enforcement activity is to ensure that every hunter is licensed. The argument that the combination license serves to reduce the number of illegal kills offers no justification for distinguishing between the resident and the nonresident in the imposition of the big game combination license.

(2) Whether the outfitters' equal responsibility justifies the nonresident combination license

Montana law makes an outfitter (hunting guide) responsible equally with his client for violations by his client of the fish and game laws.[20] Montana argued in the District

[20]Section 26-906, R.C.M., 1947.

Court that the nonresident combination license somehow is justified because of its relationship to the equal responsibility statute. Perhaps the most coherent statement of the argument is set forth in the testimony of Orville Lewis, Montana Fish and Game official (Tr. 239, 240):

> Well, of course the combination license fits into that picture quite well from the standpoint that these folks (nonresidents) are fully licensed in the field. There is not the problem of the nonresident discovering an animal for which he is not licensed and killing it. That problem is avoided. And it takes some responsibility off from the outfitter at the same time. I guess what I'm trying to say is it not only helps our law enforcement program to have a combination license but it also, I believe, helps out the outfitter in terms of his responsibility in reporting these violations. (Tr. 239, 240). (Emphasis added).

It is palpably arbitrary to penalize the nonresident hunter with higher license fees for the combination license in order to lighten the enforcement burden of the outfitter. In any case, only twenty percent (20%), at most, of nonresident hunters use the services of outfitters. (Tr. 248). It is not fair to burden all nonresident hunters with the combination license simply

because some of their number use outfitters. Conversely, some residents use the services of outfitters, although the percentage of residents using outfitters is smaller than that of nonresidents. (Tr. 23). These residents are not compelled to purchase a combination license. Thus, even assuming that there is some legitimate relationship between the combination license and the equal responsibility law, the classification is not at all appropriately tailored to such relationship.

Any relationship between the combination license requirement to nonresidents and the fostering of legitimate governmental purposes vis-a-vis assisting outfitters is so attentuated as to amount to the kind of arbitrary governmental action forbidden by the Constitution.

(3) Whether the nonresident has a greater temptation than the resident to shoot illegal game

Montana argued that the nonresident has a greater temptation to shoot illegal game; that, while the nonresident may think he wants to hunt only elk, he often times gets out in the field and sees other species and "is sometimes tempted beyond his capability." (Tr. 8). No concrete evidence was addressed to establish this greater "temptation factor" on the part of nonresidents than on the

part of residents.

Apparently, the state's position is that the combination license will insure that the nonresident hunter is licensed in the field for species that he might encounter and be tempted to shoot. However, in the 1975 season, the nonresident combination license included one elk and two deer--the deer "A" tag and the deer "B" tag. It is undisputed that the deer "B" tag is valid only in limited areas of the state--"east of central Montana." (Tr. 9). Elk, with a few minor exceptions, are only found in the mountainous regions, "west of central Montana." (Tr 9, 10). Assuming the purpose of the combination license is to insure that the nonresident who is hunting elk will also be licensed for deer in case he runs into a deer in the field, it hardly is necessary that he have a license for two deer. In any case, the second deer tag is not even valid in the areas where he will be hunting for elk.

Actually, there is evidence which indicates that the big game species most often encountered while hunting for elk, is moose. (Tr.144). If the nonresident hunter has an uncontrollable urge to blast anything he sees in the field, it would be as logical to add moose to the combination license as it is to add any other

species.

The entire argument that the nonresident hunter is less able to abide by the law and control his temptation is intolerably parochial. This same argument was made by the Montana Fish & Game Department in the recent case, State v. Jack, 539 P. 2d 726 (1975). In that case, Montana attempted to justify the requirement that nonresident hunters must be accompanied by licensed outfitters to hunt big game in most areas of Montana. Section 26-909, R.C.M., 1947. Montana argued inter alia:

> That state regulations and terrain are more likely to be obeyed and respected on the assumption that residents are more familiar with the laws and more jealous as to the maintenance of the local environment. (At 728, 729).

The Montana Supreme Court rejected these arguments and found the provision violative of equal protection. The Court stated:

> The state further contends the law fosters better protection for private landowners and more effective law enforcement. Yet the evidence completely fails to establish that more nonresidents than residents are found to be in violation of the law, or that hunters as a group are less law abiding than fishermen or other outdoor sportsmen. (P. 730). (Emphasis added).

Thus, the increased "temptation" on the part of the nonresident to shoot game illegally is not supported by the evidence. Nor, does the nonresident combination license requirement truly appear to have been developed in response to a perceived greater temptation on the part of nonresidents.

(4) Whether the nonresident combination license is justified by the asserted tendency of nonresidents to engage in license pooling

Montana also has argued that, without the combination license, a group of nonresident hunters would tend to purchase individual licenses of different types and engage in illegal license sharing. (Tr. 237, 238). Apparently, the argument is that, if each nonresident is compelled to purchase a combination license--which includes one elk, one deer, one bear--there would be less likelihood of three hunters banding together and purchasing one elk, one deer and one bear license among them and then sharing the licenses depending on which person killed which species.

There was no concrete evidence produced to indicate that this type of practice in fact happens to any appreciable extent. In any case, it is clear that residents have the same (or greater) opportunity to engage in license pooling. This is particularly true where husbands and wives are

involved. (Tr. 258). Furthermore, it was admitted that nonresidents tend to use the services of outfitters to a greater degree than residents. (Tr. 254). Since outfitters are responsible equally with their clients for game violations of their clients (Tr. 253, 254), the outfitters are a "valuable tool in enforcing the fish and game laws." (Tr. 254). Because of this, the evidence indicates that the residents might well have more opportunity on the average to violate the game laws (by license pooling or otherwise) than the nonresident.

The license "pooling" argument serves as no justification for distinguishing between the resident and the nonresident hunter in the imposition of the combination license.

(5) Whether the assertion that nonresidents want the combination license can justify its constitutionality

Montana produced two outfitters who testified that their nonresident clients wanted the nonresident combination license. (Tr. 290, 307). The fact that some nonresidents support the mandatory combination license is irrelevant to its constitutionality. Obviously, the nonresident Appellants in the present case do not want it.

Moreover, the testimony adduced by the state on that point is not credible. (Tr. 301, 302).

(6) Whether the argument that most residents voluntarily buy a combination license can justify the mandatory combination license imposed on nonresidents

Montana offered evidence that, in 1969, of the total number of residents who purchased elk licenses (72,837), ninety-seven percent (97%) also bought "some combination of other licenses" (Tr. 394, 395), so that "...even though they were not required to have the combination license" most bought "some kind of combination." (Tr. 395).

The testimony indicated only that ninety-seven percent (97%) of the residents who purchased an elk license also purchased some other license. That other license may simply have been a fishing license--or a game bird license. The mandatory combination license for nonresidents includes one elk, one deer and one black bear. Because the bear license is voluntary with residents and because bear hunting is unpopular, only a smattering of residents purchase bear licenses. (Tr. 396, 397).

Furthermore, it is much more sensible for the resident to purchase some combination of licenses. The typical resident will be in Montana for the entire hunting season--including the bird season which generally begins earlier than the big game season. The nonresident usually only has approximately

one week to hunt in Montana. (Tr. 143, 294). A wide-ranging combination license makes much less sense for the nonresident hunter than it does for the resident hunter. Yet, it is the nonresident who is compelled to purchase the combination license while the resident is not.

The constitutional challenge here is to a burden imposed on nonresidents which is not imposed on residents. The proof does not indicate that all, or even most of the residents, purchase the same combination license that is required of nonresidents. Indeed, the proof is to the contrary. Even if it were true, however, this fact would not dispose of the constitutional problem.

When all of these proffered justifications are examined, they fail. One is led inexorably to the conclusion that the real purpose behind the nonresident combination license is to gouge the nonresidents even more for the right to hunt big game in Montana. The state, apparently realizing that it could only raise nonresident hunting rates so high before the discrimination becomes too blatant, chose to do by indirection what it feared to do by direction. Indeed, this much appears to be admitted by Fish and Game official, Don Brown, who, when asked

from the point-of-view of a professtional fish and game person whether there was any justification, responded as follows:

> Q. [Goetz] But from your point of view as an expert Fish and Game person is there any justification or rationale which underlies that combination license for nonresidents? (Emphasis added).
>
> A. [Brown] In my opinion, I have accepted it in that it being both national and traditional that the nonresident makes up for a differential fee that the resident pays through other ways.
>
> (Tr 7; see also testimony of Brown, p. 8).

If the required nonresident combination license is simply a revenue-raising device, it is a crude device indeed. As noted above, it creates an incentive for the nonresident to waste game by taking game he does not particularly desire. It also does not at all appear to be tailored to additional revenue needs of the Fish and Game Department resulting from the nonresident presence. See Toomer v. Witsell, supra, p. 7.

As the Court said in Toomer:

> We would be closing our eyes to reality, we believe, if we concluded that there was a reasonable relationship between the danger represented by noncitizens, as a class, and the severe discrimination practiced upon them. 334 U.S. at 399.

In the present case, any relationship between the combination license requirement imposed on nonresidents and purported governmental objectives is haphazard at best. The Federal Constitution does not permit a state, under the guise of conservation, to work out ulterior designs. Foster Packing Co. v. Haydel, 278 U.S. 1 (1928).

For these reasons, the nonresident combination big game license imposed by Montana is unconstitutional.

B. THE MAGNITUDE OF THE LICENSE FEE DIFFERENTIAL BETWEEN RESIDENTS AND NONRESIDENTS IS CONSTITUTIONALLY DISCRIMINATORY BECAUSE IT GROSSLY EXCEEDS ANY RESIDENT-BORNE TAXES FOR CONSERVATION AND ANY INCREASED ENFORCEMENT COSTS POSED BY NONRESIDENTS

Plaintiffs have challenged the magnitude of the big game license fee differential between residents and nonresidents.[21]

---

[21] If the nonresident hunts for elk only he must pay $225.00 (for the combination license). In 1975, the fee was $151.00 for the nonresident. In contrast, the resident can buy a single elk license for $9.00. The resident elk license was $4.00 in 1975. Assuming residents simply purchase the full set of licenses which nonresidents must purchase under the big game combination license, the fee would be $21.00 ($12.00 in 1975). (A. 53-56).

Toomer v. Witsell, supra, and Mullaney v. Anderson, supra, p.7, establish that larger license fees for nonresidents are justifiable, but only to the extent that nonresidents pose additional enforcement burdens on the state and to the extent that state taxpayers are assessed for conservation expenditures which nonresidents do not bear.

In an apparent attempt to bring its license fee differentials within the Toomer and Mullaney rationale, the state argued that the differentials are justified both by the increased enforcement costs posed by nonresidents (per capita) and as compensation for tax expenditures for conservation borne by residents.

The District Court found that the license fee differential in Montana could not be supported on any cost basis. Don Brown, the major witness for Defendants, flatly admitted in deposition the license fee differentials in Montana are "arbitrary." (Tr. 197, 198). When asked about this at the hearing, he stated that he did not realize the meaning of the word arbitrary. (Tr. 198). When asked:

> Q. [Goetz] Well is it your testimony that these license fee differentials are justified by game management practices on a reason[ed] basis? (Tr. 199).

Mr. Brown answered:

> A. [Brown] I guess I have to answer the question that I do believe simply because I have conditioned myself over the years to live within the acts of the legislature.
>
> (Tr. 199).

Thus, the state has admitted that the license fee differentials in Montana are arbitrary. Little more need be said.

(1) The higher fees for nonresidents are not reasonably related to higher enforcement costs

In defense of higher license fees assessed nonresidents, Montana argued that the cost per capita for law enforcement is higher for nonresidents than for residents.

No systematic cost data was presented by Montana to establish this point. (Tr. 251). This is not to suggest that the burden of proof lies with Defendants on that point, but Plaintiffs made extensive efforts through pre-trial discovery to ascertain whether, indeed, there is an increased cost factor, for nonresidents and, if so, the magnitude of such factor.[22] The Supreme Court, in Mullaney v. Anderson, supra, said:

---

[22] See Plaintiffs' 1st and 2nd sets of Interrogatories. See Plaintiff's depositions of Fish and Game Director, Woodgerd, and Fish and Game employees Long, Brown and Lewis.

> The Tax Commissioner relied on the higher cost of enforcing the license law against nonresident fishermen to justify the difference in fees. ...But there is no warrant for the assumption that the differential in fees bears any relation to this difference in cost, nothing to indicate that it "would merely compensate" for the added enforcement burden. Indeed, the Tax Commissioner and Deputy Enforcement Officer specifically disclaimed any knowledge of the dollar cost of enforcement.
>
> . . .
>
> In this case, respondents negatived other possible bases raised by the pleadings for the discrimination, and the one relied on by the Commissioner, higher enforcement costs, was one as to which all the facts were in his possession. Respondents sought to elicit these facts by interrogatories and cross-examination without avail. Under the circumstances we think they discharged their burden in attacking the statute. (342 U.S. at 418, 419). (Emphasis added).

The one piece of systematically-compiled evidence relating to differences in cost of enforcement between nonresidents and residents is found in Defendants' Exhibit A, pp. 11, 12. Those tables indicate that the number of violations per hunter is higher for nonresidents than for residents. It should be noted that the tables deal with numbers of apprehended violations. Numerous

"violations" of game laws occur which go unsolved. (Tr. 252). Thus, three factors must be recognized in viewing the tables dealing with violations: (1) Residents know the terrain better than nonresidents (Tr. 253) and therefore, may be more difficult to apprehend (i.e. residents may well commit as many game violations as nonresidents, but the proportion of apprehended violators may well be smaller). (2) Nonresidents use the services of outfitters to a greater extent than residents (Tr. 253). Outfitters are obligated by law to turn in their clients who violate the law (Equal Responsibility Law) (Tr. 254). Outfitters are a valuable tool in enforcing Montana's game laws (Tr. 254). Therefore, it appears that many of the apprehended violations by nonresidents are reported by outfitters and it costs the State of Montana virtually nothing for law enforcement- either to apprehend the violator or prove its case, if contested. (Tr. 254, 255). (3) Poaching, the illegal taking of a game animal, can occur at any time of year. Nonresident hunters, of course, are in the state for a short period of time. Residents have the opportunity to commit game violations the year around--and surely some do. Significantly, the tables appearing in

Defendants' Exhibit A, cover only the months of September-December (the big game hunting season). (See Tr. 260-267).

The state also argued that nonresidents tend to engage in illegal license pooling to a greater extent than residents (Tr. 237) and that the state expends efforts in search and rescue operations for nonresidents who tend to get lost more than residents. In both cases, no systematic cost figure was presented. (Tr. 266). In both cases, it was admitted that because nonresidents use outfitters to a greater extent than residents, the actual per capita problems posed by the nonresident hunter might well be less than the problems posed by the average resident hunter. (See Tr. 266).

One of the most forceful arguments presented by Montana related to the increased costs of tracking down and prosecuting nonresident violators who often escape the state before the investigation culminates. (Tr. 235, 236). Again, there were no concrete cost figures presented. The prosecutions of nonresidents beyond the state borders under the Lacey Act are relatively few ("between 10 and 20 violations" [per year]). (Tr. 270).

Furthermore, most game violations are misdemeanors. (Tr. 263). There would

likely be a large percentage of nonresident game violation defendants who would forfeit bond rather than remain in the state or return to the state to resist the charges in Court. (See Tr. 264, 265).

Given this lack of concrete evidence, it is seriously questionable whether the nonresident actually imposes <u>any</u> additional per capita law enforcement cost whatsoever!

The consulting economist for Plaintiffs calculated the actual level of conservation-related tax expenditures borne by residents and not borne by nonresident hunters. Lacking any concrete evidence of any increased enforcement cost posed by nonresidents, she performed a "sensitivity test"--<u>i.e.</u> she assumed for the sake of the analysis that nonresidents cost twice as much as residents per hunter for enforcement. (Tr. 62).

Viewed in light of the evidence, the economist's assumption for the sake of her calculations of a 2-1 enforcement cost differential appears very

generous.[23]

Plugging this 2-1 enforcement cost ratio into fee calculations, and considering the conservation-related expenditures borne by Montana taxpayers but not by nonresidents, she calculated that any fee differential of greater than 2.5-1 (nonresident to resident) would violate the standards of Toomer and Mullaney. (See, Section 2, below).

The evidence on the question of whether nonresidents pose additional enforcement costs (per capita) on the state indicates that they pose very little, if any.

(2) The magnitude of the Montana license fee differential far exceeds a reasonable compensation factor for conservation-related taxes borne only by residents

Only a very small percentage (approximately 2%) of the revenues used to support the operations of the Montana Fish and Game

---

[23] The Wildlife Management Institute Study, "Report to the Western Association of State Game & Fish Commissioners on Nonresident Hunting and Angling", July, 1971; Plaintiffs' Exhibit No. 7, assessed the added cost of enforcement per nonresident hunter at a factor of only 0.5; i.e. the enforcement cost for non-resident vis-a-vis resident was assumed to be 1.5-1; p. 15.

Department is derived from the general fund of the state (i.e. through state taxes). (Plaintiffs' Exhibit No. 1. Governor's Executive Budget--Fish & Game Section). Some income is received from snowmobile registration, motorboat registration, and the Federal Government. (Id.) The great bulk of the revenues however, come from license fees. (Id.) Two-thirds of the license revenue is derived from nonresident contributions. (Tr. 34).

This is significant because the question here involves the extent to which nonresidents can be charged for licenses to reimburse the state for resident-borne tax assessements which relate to game preservation and management. The plain fact is that the resident of Montana pays very little for the operation of the Fish and Game Department. Indeed, the contribution to the Montana Fish and Game Department from the Federal government is larger than the contribution to that Department from the general fund of Montana. (See Plaintiffs' Exhibit No. 1). That is not to say, of course, that there are not other taxes paid by residents which either directly or indirectly support wildlife. These are considered below.

The consulting economist for Plaintiffs presented an extensive analysis of these direct and indirect expenditures. She approached the question by analyzing the expenditures of the State of Montana which related either directly or indirectly to the provisions of the service (game management). She then approached the pricing problem for the services by dividing the expenditures of the state relating to its hunting activity into "direct costs (expenditures)" and "indirect costs (expenditures)". (See Plaintiffs' Exhibit No. 4). Direct costs were defined as those "costs which would not occur if the Government did not produce the service (variable costs)". (Tr. 54). (Example of a "direct cost": "The cost of law enforcement associated with the hunting privilege"--i.e. game warden, Tr 55). The economist took the direct cost figure and divided it by the total number of hunters to get an average-hunter price per license. (Tr. 55, 56).

The economist then treated the issue of "indirect costs"--i.e. "expenditures by the State of Montana which would occur whether or not the state was in the business of licensing hunters. They are the overhead, if you will, or the fixed costs of operating State Government", (Tr. 57)

(example--maintenance of general law and order--Tr. 57). Such expenditures obviously benefit nonresident hunters to a certain degree--but they also benefit everybody else and would be spent regardless of whether the state involved itself in game management.

The economist calculated the number of person-days spent by hunters in Montana as a percentage of person-days spent by residents (who also enjoy the benefits) and then applied that percentage to the entire tax-supported budget of the State of Montana (on the generous assumption that the nonresident hunter receives some benefits from all state expenditures.[24] (See Tr. 56-57). For the nonresident, she added these costs onto the direct license cost derived (residents presumably already pay for these indirect expenditures by their tax contributions). The resulting figure was the correct (albeit wholly generous) fee for the nonresident license (i.e. the fee which would

---

[24]This is a generous assumption because there are obviously state expenditures for services nonresidents do not use--e.g. mental institutions, schools, etc.

compensate the state for tax-related conservation expenditures made by residents for conservation expenditures--and in fact, for all expenditures of the state).

However, because there were contentions by the State of Montana that nonresidents cost the state more per hunter for law enforcement, and because such additional costs would be direct costs resulting from the State's game management activities, Dr. Schaill doubled the direct license attributable cost vis-a-vis the nonresident. (See this brief, pp. 77, 78).

Even given these assumptions, generous to the state,[25] the economist concluded that the average hunter license fee differential between nonresident and resident hunters should be approximately 2.55-1.

This analysis is remarkably close to the ratio derived in the "Report to the Western Association of Game and Fish

---

[25]And after adjusting her figure of nonresident hunter-days spent in Montana to meet the (legitimate) objections of the Defendants--that her initial analysis had used incorrect figures. (Tr. 405).

Commissioners on Nonresident Hunting and Angling", prepared by the Wildilfe Management Institute, July, 1971 (Plaintiffs' Exhibit No. 7). That report calculated that the cost to the Western States of providing hunting is about three times as high for nonresidents as residents. (Plaintiffs' Ehxibit No. 7, p. 15). For good measure, and to give the states the benefit of the doubt, the report reached a recommendation of a 1-5 ratio (resident fee to nonresident fee):

> RECOMMENDATIONS
>
> 1. That nonresident license fee differentials to hunt any species in the western states be reasonable. Reasonable is defined as the general ratio of 1 to 5 between resident and nonresident fees which existed in the 37 non-western states in 1971. Thus, it is recommended that nonresident hunting fees be no greater than five times the amount a resident would have to pay for the same privileges. (P. 22).

Obviously, the license fee differential in Montana grossly exceeds these ratios.

Defendants attempted to impeach the analysis of Plaintiffs' economist by arguing that she underestimated the "direct" costs attributable to game management. An extensive treatment of that criterion is not warranted here. However, it should

be noted that the economists testifying for the state engaged in admittedly erroneous methodologies which greatly overestimated the direct costs attributable to game management. For instance, Bill Long, economist for the state, prepared a statement which attempted to calculate "direct" expenditures of the State of Montana by Departments other than Fish and Game. In doing so, Long included the entire tax-supported expenditures of agencies such as the Water Quality Bureau, the Air Quality Bureau and the Forestry Division as direct costs for fish and game purposes. Upon cross-examination, Mr. Long admitted:

> ...I guess I'd have to say that it isn't reasonable for an economist to do that. ... (Tr. 353).

The State's other economist, Dr. Copeland, agreed that Mr. Long's approach was not proper:

> Q. [Goetz] And I assume you agree with Mr. Long that it is not reasonable from an economist's standpoint to attribute the full 100 percent of the Water Quality Bureau budget to the activities of fish and game?
>
> A. [Copeland] Yes, I agree with that.
>
> (Tr. 381)

Additionally, the state, through the testimony of Long and Copeland, argued that "opportunity costs" can legitimately be considered in justifying the license fee differential. (Tr. 369, 315). The argument is that Montanans sacrifice economically in foregone economic opportunities in order to provide good environment for wildlife habitat. Upon examination it was unclear whether they could be sure that Montanans actually suffered any real deprivation vis-a-vis citizens of other states. (Tr. 376). No systematic relation was made between such lost "opportunity costs", if any, and the magnitude of the license fee differentials. For instance, Dr. Copeland testified:

> Q. [Goetz] Now my understanding is that you did not make a flat statement that the differential in the license fees under the Montana system either for 1975 or 1976 is justified in your standpoint?
>
> A. [Copeland] I made no statement either way.
>
> Q. [Goetz] You don't purport to hold that position one way or another, do you?
>
> A. [Copeland] That's correct.
>
> (Tr. 390, 391).

Significantly at no time did Defendants make

any systematic application of its arguments or data to the magnitude of the differential here in question.

When questioned regarding the appropriateness of including "opportunity cost" in calculating license fee differentials, Dr. Copeland admitted that he had little real authority for reaching his conclusions:

> Q. [Goetz] OK. Do you have any examples that have done that rather directly on the lines that you have testified to, that is, to reimburse for foregone capital income?
>
> A. [Copeland] I can think of none.
>
> Q. [Goetz] Do you have any authority for the proposition that those opportunity costs, those foregone costs should be included in the pricing of this kind of licensing system?
>
> A. [Copeland] My experience as an economist.
>
> Q. [Goetz] Anything else?
>
> A. [Copeland] No.
>
> (Tr. 382, 383).

Plaintiffs' economist testified that it is not proper for a state to try to charge nonresidents for coming into the state "to pay back their lower incomes and lack of economic development, it would appear to me to be a restriction on free travel by tourists, by people in the United States.

If we attempted to do that, it would appear equally absurd and possibly even illegal." (Tr. 402).

Indeed, this appears to be precisely the type of abuse that the privileges and immunities clause was designed to prevent.

For these reasons, the District Court's finding was correct that the state could not reasonably justify the discrimination on a cost basis.

CONCLUSION

As the privileges and immunities clause makes clear, participation in the Federal Union is a two-way street. Montana reaps significant hunting-related benefits from the substantial Federal lands in the state. (Tr. 40). For fiscal year 1973, Montana was apportioned $1,105,387.80 from the Federal Government under the Pittman-Robertson Act[26] for wildlife restoration. Only seven states received more (all, except Alaska, with substantially larger populations than that of Montana). (Plaintiffs' Exhibit No. 6, Table 2). In 1972, Montana's share of the Federal tax burden was $606,150,000.00 (44th largest). For the same year, its share of the Federal tax

---

[26] 16 U.S.C. 669, et seq.

outlays was $1,092,313,219.00 (39th largest).[27]

The "Report to the President and to the Congress by the Public Land Law Review Commission", One Third of the Nations' Land, (June, 1970), made the following recommendation:

> Nonresident Discrimination
>
> Recommendation 67: State policies which unduly discriminate against nonresident hunters and fishermen in the use of public lands through license fee differentials and various forms of non-fee regulations should be discouraged. (P. 174).

If Montana is to be part of a nation of states; if Montanans are going to continue to use, free of charge, the Federal lands within the State (to take 75% of the elk taken in the state [A. 57]); if the Montana Fish and Game Department is going to continue to accept an inordinate share of Pittman-Robertson funds, then it must accept the concomitant obligations of Federal citizenship. The state must simply exercise its police power within the limits of the Federal Constitution.

Appellants respectfully submit that the decision of the District Court should

---

[27] Barone, et al., The Almanac of American Politics, 1974, Gambit, Boston, p. 574.

be reversed.

Respectfully submitted this 6th day of April, 1977.

GOETZ & MADDEN

By James H. Goetz
JAMES H. GOETZ
P. O. Box 1322
Bozeman, Montana 59715
Attorney for Appellants

CERTIFICATE OF MAILING

I, JAMES H. GOETZ, hereby certify that on this 6th day of April, 1977, I served true and correct copies of the above and foregoing Brief of Appellants, upon the following counsel of record, by depositing same in postage prepaid envelopes, addressed to the following addresses:

Paul A. Lenzini
Chapman, Gadsby, Hannah & Duff
1700 Pennsylvania Avenue, N.W.
Washington, D. C. 20006

Clayton R. Herron
Attorney at Law
P. O. Box 783
Helena, Montana 59601

James H. Goetz
JAMES H. GOETZ

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1150

LESTER BALDWIN, RICHARD CARLSON, JEROME J. HUSEBY, DAVID R. LEE, and DONALD J. MORIS,
Appellants,

v.

FISH AND GAME COMMISSION OF THE STATE OF MONTANA; WESLEY WOODGERD, Director of the Department of Fish and Game of the State of Montana; ARTHUR HAGENSTON; WILLIS B. JONES; JOSEPH J. KLABUNDE; W. LESLIE PENGELLY; and ARNOLD REIDER, Commissioners of the Fish and Game Commission of the State of Montana,
Appellees.

On Appeal From the U.S. District Court
District of Montana
Butte Division

BRIEF OF APPELLEES

PAUL A. LENZINI
CHAPMAN, DUFF and PAUL
1730 Pennsylvania Avenue, N.W.
Washington, D. C. 20006
Attorney for Appellees

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

TABLE OF AUTHORITIES

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1150

LESTER BALDWIN, RICHARD CARLSON, JEROME J. HUSEBY, DAVID R. LEE, and DONALD J. MORIS,
Appellants,

v.

FISH AND GAME COMMISSION OF THE STATE OF MONTANA; WESLEY WOODGERD, Director of the Department of Fish and Game of the State of Montana; ARTHUR HAGENSTON; WILLIS B. JONES; JOSEPH J. KLABUNDE; W. LESLIE PENGELLY; and ARNOLD REIDER, Commissioners of the Fish and Game Commission of the State of Montana,
Appellees.

On Appeal From the U.S. District Court
District of Montana
Butte Division

BRIEF OF APPELLEES

QUESTIONS PRESENTED

1. Whether imposition by the State of Montana of a license fee for nonresident recreational hunting higher in amount than the resident fee violates the

privileges and immunities clause and the equal protection clause?

2. Whether a requirement of the State of Montana that nonresidents desiring to hunt elk purchase a combination license authorizing the hunting of other game species violates the privileges and immunities clause and the equal protection clause?

STATEMENT

1. Appellants are four residents of Minnesota. Elk hunting not being available in that state, they wish to hunt elk in Montana on terms substantially equal to those imposed on Montana residents. They contend that any license fee differentials not cost justified fail to meet strictures imposed by the U.S. Constitution. Joined by a Montana outfitter, they seek reversal of the decision of a three-judge district court which rejected constitutional challenges to the big game license structure enacted by the Montana legislature.

In the court below, appellants contended that two features of Montana's license structure offend the Constitution: (a) the requirement that nonresidents who wish to hunt elk purchase a combination license that permits the taking of certain other game animals as well as elk; and (b) the imposition of higher license fees on nonresidents as compared to residents. In the latter, appellants argued below that the resident/nonresident ratios that obtained were inconsistent with the ratios resulting from proper application of standards utilized in the pricing of public goods and services and inconsistent also with generally accepted accounting principles (R. 52, 108-112).

The court below held that the right asserted by appellants is recreational in character, that recreational hunting in a sister state is not a fundamental right protected under the privileges and immunities clause, and that the license differential between residents and nonresidents bears a rational relationship to legitimate state purposes (A. 59-72). The dissenting judge concluded that the theory of state ownership of wildlife is in disrepute and that discrimination between resident and nonresident is invidious. The dissent states that even though recreational hunting is not a fundamental right, justification of discrimination on political grounds is inherently inappropriate (A. 74-80).

2. Montana, with an area of approximately 147,000 square miles, is the fourth largest state of the United States in terms of area. Approximately thirty percent of the land in Montana is federally owned. With a 1972 population of only 716,000, per capita income of Montana residents during 1974 was twelve percent below the national average for that year and ranked 34th among the states (A. 56-57).

3. Montana maintains significant populations of big game including, elk, deer and antelope. The elk population is one of the best populations in the United States (R. 191), and the elk is prized by hunters who come to Montana from across the world to pursue the animal for sport.[1] Indeed, during the period from 1960

---

[1] As the court below found, elk hunting is recreational in nature and expensive recreation at that. For a typical seven-day hunt a nonresident spends on the order of $1450 in expenses, exclusive of outfitter's fee and license (A. 68, R. 283-284). For the license year 1974-75, nonresident hunters visited Montana from each of the other states, the District of Columbia, the Commonwealth of Puerto Rico, and eleven foreign countries (Defendants' Ex. A, p. 8).

to 1970 the number of Montana residents licensed to hunt game within the state increased by approximately 67 percent, while nonresidents increased by approximately 530 percent (A. 56-57). During the license year 1974-75, approximately 31,000 nonresidents hunters were licensed by the state (R. 64).

Owing to its successful management programs for elk, Montana has not been compelled to limit numbers of nonresidents or residents by means of drawings as in other states with harvestable elk populations (R. 243). Further, as the court below found, elk is not hunted commercially in Montana (A. 60) nor, for that matter, is any species of big game animal (R. 32).

As the court also found, elk is much sought for its trophy value and nonresident hunters as a group are more interested in the trophy, a distinctive set of antlers, than resident hunters whose interest is more often meat for the table (A. 60, R. 245). Elk are found in the primitive, mountainous regions of western Montana, and are generally not encountered in the prairie-type, eastern two-thirds of the state (R. 9-10, 249). During the summer elk move to higher elevations which tend to be federally owned lands. Beginning in late fall, the elk move from the less productive, higher elevations to lower, privately owned lands which provide critical winter habitat necessary to survival of the elk. During the critical midwinter period the elk are supported by ranchers with few complaints from the latter (R. 46-47, 191, 285-286).[2]

[2] Many complaints might well be unavailing. As the Supreme Court of Montana has stated:

> Montana is one of the few areas in the nation where wild game abounds. It is regarded as one of the greatest of the state's natural resources, as well as the chief attraction for visitors. Wild game existed here long before the coming of man. One who acquires property in Montana does so with notice and knowledge of the presence of its natural habits. Wild game does not possess the power to distinguish between fructus naturales and fructus industriales, and cannot like domestic animals be controlled through an owner. Accordingly, a property owner in this state must recognize the fact that there may be some injury to property or inconvenience from wild game for which there is no recourse.

State v. Rathbone, 110 Mont. 235, 242, 100 P.2d 86, 92-93 (1940).

Elk management is expensive. In regions of the state with significant elk populations more Fish and Game personnel time is spent on elk than any other big game species (Defendants' Exhibit A, p. 9). For the period July 1, 1974-June 30, 1975, approximately 1675 hours of flying time were devoted to elk management in censusing for winter survival, cow-calf ratios, and sex ratios, elements in population dynamics (R. 189-190).

4. Owing to the fact that Montana supports significant populations of big game animals, there exist in the state approximately 405 licensed outfitters who equip and guide hunting parties (R. 295). Outfitters are regulated by the state and, in the main, provide services to nonresident hunters and fishermen. For nonresidents hunting elk in western Montana, it is estimated that as high as fifty percent utilize outfitters for such wilderness hunting (R. 258). The three outfitters who testified at trial stated that virtually all of their clients were nonresidents (R. 141, 281, 307).[3]

5. In attempting to enforce its conservation laws, the state employs a game warden force of seventy individuals (R. 234). On an average, each warden district

[3] During 1973, 516 residents and 7,423 nonresidents employed outfitter services (Defendants' Exhibit A, p. 8).

comprises approximately 2100 square miles, and there is scant hope that hunting and fishing activities over such an area can be adequately controlled by the warden (R. 234, 289). To assist wardens in law enforcement the Montana legislature enacted the so-called "equal responsibility" law.[4] By making outfitters and guides equally responsible for violations of law committed by persons within their hunting parties if such violations are not reported, the Montana legislature has made outfitters and guides an important adjunct to the state's law enforcement, an adjunct located in the field where violations occur. The efficacy of the equal responsibility law was related at trial by an outfitter:

> The first thing I do as my hunters arrive the first day we have a session. With this being a law, I quote this to them and I inform them that if they break the law they are only going one place because I am not going to be responsible for them. They are going to go to town and see the Judge. Now this to me has been a great help in knocking off violations that would occur. I've had a couple of incidents where they didn't break the law but they thought they were going to. But I informed them just what would happen and it didn't occur. But it could have. This is a very good law to me.
>
> (R. 287)

[4] R.C.M. (1947) § 26-906 provides as follows:

> Any person accompanying a hunting or fishing party as an outfitter or agent or employee of such outfitter shall be equally responsible with any person or party employing him as an outfitter for any violation of the law; any such outfitter or employee of such outfitter, who shall willfully fail to or refuse to report any violation of the law, shall be liable to the penalties as herein provided. If any professional guide commits any violation of the laws, or applicable regulations relating to fish and game, outfitting or guiding with actual or implied knowledge of an outfitter then employing such guide, the outfitter is legally responsible for such violation for all purposes under the laws or regulations if the outfitter fails to report any such violation to proper authority.
>
> No person may hire or retain any outfitter or professional guide unless the outfitter or professional guide is currently licensed in accordance with the laws of the State of Montana.

Nonresidents who desire to hunt deer in Montana, may purchase an individual deer license for $50 (A. 55). In order to hunt elk, however, a nonresident must purchase a combination license for $225 which entitles the licensee to hunt one elk, one deer, one bear, and game birds, and to fish with hook and line. (A. 37-38). Nonresidents, as a rule, hunt in larger groups than residents and "license swapping" is a problem often encountered wherein a member of a party will attempt to take animals on licenses held by others in the party (R. 237).[5] Such group hunting is not a legal practice in Montana (R. 237). The combination license is designed to limit this practice and is also an aid to outfitters subject to the equal responsibility law in providing greater assurance that nonresidents not succumb to the temptation to pursue game for which they are not licensed. The witness Miller, an outfitter and director of the Montana Outfitters and Guides Association, testified: "I would hate to take any hunter into my area with just a deer license or an elk license because all the game is intermingled, the deer and elk in these areas. It would be awful hard if a big mule buck jumps up and a fellow has an elk tag and has never seen one. He'll swear it's an elk and he'll shoot it and if he doesn't have a deer tag, we're in trouble. I would hesitate to take hunters out without a combination license" (R. 287-288).

[5] Elk habitat in western Montana also supports significant deer and bear populations (R. 182, 257).

6. The court below found that the right asserted by appellants is "no more than a chance to engage temporarily in a recreational activity in a sister state, and even the chance is dependent upon the willingness of the people of the sister state to manage the subject matter of the recreation—the elk" (A. 68.) The court concluded that the asserted right is not fundamental and is not protected under the privileges and immunities clause of the Constitution. The court concluded also that discrimination between resident and nonresident hunters bears a rational relationship to the legitimate state purpose of managing elk by limiting the number of hunter days and thereby the annual kill, and that the legislature might well conclude that utilization of a discrimination-free lottery for all potential elk hunters might destroy the motivation of Montana citizens to underwrite elk management (A. 70-71). The court therefore denied all relief requested by appellants.

SUMMARY OF ARGUMENT

1. On the basis of long established tradition, states have historically favored residents in connection with license fees required for sport hunting. The tradition has been specifically approved by the courts and is held to stem from the special power which is reposed in the state over fish and wildlife within its borders. The practice is also founded in common sense. "A State may care for its own in utilizing the bounties of nature within her borders because it has technical ownership of such bounties or, when ownership is in no one, because the State may for the common good exercise all the authority that technical ownership ordinarily confers." *Toomer* v. *Witsell,* 334 U.S 385, 408 (1948) (concurring opinion of Frankfurter, J.). The power

of the state to impose on nonresidents higher license fees for sport hunting has never been denied by the courts.

Ownership of fish and wildlife resides in the state as the representative of its people for the purpose of regulation so that the common rights of the people be equally protected. Subject to restraints imposed by the Constitution, the state may regulate the taking, subsequent use, and property rights that may be acquired in wildlife. *Lacoste* v. *Dept. of Conservation,* 263 U.S. 545, 549 (1924). Indeed, the state as trustee is held to have an obligation, comparable to that of a fiduciary, to exercise its public trust for the benefit of its people and for generations to come. *New York ex rel. silz* v. *Hesterberg,* 211 U.S. 31, 41-42 (1908). The power of the state is also based on police power to protect a local food source. However, the trusteeship of the state is not merely an expression of the state's power to regulate. *Maryland Dept. of Natural Resources* v. *Amerada Hess Corp.,* 350 F. Supp. 1060, 1066-67 (D. Md. 1972), but of the special relationship between the state and its people over the resource.

2. The rights asserted by appellants are recreational in nature and do not constitute a privilege and immunity protected by Article IV, section 2 of the Constitution. Hunting in Montana is declared by that state's highest court to be "sport." *State ex rel. Visser* v. *Fish & Game Comm'n,* 150 Mont. 525, 531, 437 P.2d 373, 376 (1968). As such, it is not a fundamental right protected by the privileges and immunities clause. The commercial fishing cases such as *Toomer* v. *Witsell, supra,* wherein states in reliance on the ownership doctrine have attempted to establish commercial monopolies for residents are inapplicable. Nor does the

presence of federal land within Montana providing big game habitat or the fact that the state receives federal assistance for wildlife restoration transform recreational hunting into a fundamental right protected by Article IV, section 2.

3. In the context of the instant case, residence is plainly not an invidious classification condemned by the equal protection clause of the Fourteenth Amendment. Hunting license fees are an incident or regulation and are not imposed for the purpose of raising revenues for general support of the government. During 1974, a total of 31,406 nonresident hunters was licensed by the state and the number of nonresidents visiting the state to hunt during the period 1960 to 1970 had risen by 530 percent. It was plainly appropriate for the legislature to utilize a higher license fee as a means of reducing nonresident hunter days. The state has a compelling interest in regulating the use of an important natural resource and the use of fee differentials is not irrational.

Similarly, the requirement that nonresidents wishing to hunt elk purchase a combination license cannot be said to rest on grounds wholly irrelevant to achievement of Montana's objective in regulating the hunting of elk. *McGowan* v. *Maryland,* 366 U.S. 420, 425-426 (1961). It is enough that the legislature contemplated an evil in need of correction and that the measure adopted was a rational way to correct it. *Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 487-488 (1955). The combination license requirement is rationally related to Montana's vital interest in enforcing state conservation laws in primitive areas of Montana which are difficult to police.

ARGUMENT

I. The State Possesses Broad Trustee and Police Powers Over Wildlife Within Its Borders With Not Only a Right But An Obligation to Utilize The Resource For the Benefit of Its People

As the court below well observed, "Not everyone may hunt elk. There are too many people and too few elk. If the elk is to survive as a species, the game herds must be managed, and a vital part of the management is the limitation of the annual kill. That limitation may be accomplished in many ways, but all of them involve in some degree a limitation upon hunter days" (A. 67).* Limitation of hunter days is, of course, the nub of the matter and the Montana legislature has chosen to establish a license structure whose fees are higher for nonresidents desiring to hunt elk and other species. Hunting license fees are universally recognized as an economic control mechanism whereby a state may regulate the harvest of its wildlife resource. Higher license fees for nonresidents are utilized by virtually every state. See Appendix.

Nor can there be dispute concerning the nature of the state's special interest in its fish and wildlife. "[O]wnership of wild animals, so far as they are capable of ownership, is in the state, not as proprietor but in its sovereign capacity, as the representative and for the benefit of all its people in common." *Geer* v. *Connecticut,* 161 U.S. 519, 529 (1896). The Supreme Court of Montana has declared that wildlife is owned by the state in trust for its people, *Rosenfeld* v. *Jakways,* 67 Mont. 558, 562, 216 Pac. 776, 777 (1932), and a voluminous body of rulings has recognized wildlife to be pe-

* Each day that one hunter is in the field is a hunter day (A. 67).

culiarly within the power of the state, subject only to constraints imposed by the Constitution. E.g., *Kleppe* v. *New Mexico,* 426 U.S. 529, 545 (1976); *Toomer* v. *Witsell,* 334 U.S. 385, 402 (1948); *Bayside Fish Flour Co.* v. *Gentry,* 297 U.S. 422, 426 (1936) *Foster-Fountain Packing Co.* v. *Haydel,* 278 U.S. 1, 11 (1928); *Lacoste* v. *Dept. of Conservation,* 263 U.S. 545, 549 (1924); *New York ex rel. Silz* v. *Hesterberg,* 211 U.S. 31, 41-42 (1908); *Martin* v. *Waddell,* 41 U.S. (16 Pet.) 367, 410 (1842).

The dissenting judge below declared that the "ownership theory" has been denigrated and is now in disrepute (A. 74). Examination of the decisions, however, reveals that that observation is not borne out and, though semantic difficulties have occurred, the ownership doctrine remains alive and well. Thus, while the "ownership" doctrine may provide a "slender reed" upon which to defeat the federal treaty making power over migratory birds [7] which yesterday had not arrived in the state and tomorrow will be gone, *Missouri* v. *Holland,* 252 U.S. 416, 434 (1920), and while the ownership doctrine is not so special an interest as would justify a state in creating a commercial monopoly therein for residents, it is clearly erroneous to assert that the ownership doctrine is in disrepute. Only last term this Court declared that the states unquestionably "have the broad trustee and police powers over wild animals within their jurisdictions." *Kleppe* v. *New Mexico, supra* at 545. Other recent decisions which reaffirm the ownership doctrine include *State of Maine* v. *M/V Tamano,* 357 F.Supp. 1097, 1100-1101 (D. Me. 1973); *United States* v. *Plott,* 345 F.Supp. 1229, 1232 (S.D.N.Y. 1972) ("The *Geer* rule, which is still the federal law, far from

[7] Elk are resident, not migratory species.

holding that the state does not own wild animals, clearly specifies that it *does* . . . .") ; *Maryland Dept. of Natural Resources* v. *Amerada Hess Corp.,* 350 F.Supp. 1060 (D.Md. 1972); and *New Jersey Dept. of Environmental Protection* v. *Jersey Central Power & Light,* 125 N.J. Super. 97, 308 A.2d 671 (1973). In *Amerada Hess* the state brought a common law action for damage to the waters of the state resulting from a negligent oil spill in Baltimore harbor. Defendant moved to dismiss, arguing that the state had but a usufructuary interest in its waters as a trustee and not a proprietary interest sufficient to support the common law action. Defendant contended that *Toomer* v. *Witsell, supra,* must be read as holding that the state's interest in its natural resources is merely a right to regulate. Concluding that the action would lie, the court determined that a state has technical ownership of the bounties of nature within her borders and such ownership gave Maryland the legal right to bring suit in behalf of the public in *parens patriae.* 350 F.Supp. at 1067. The ownership doctrine has by no means been interred by the courts.

As indicated by the court in *Kleppe* v. *New Mexico, supra,* the power of the state over fish and wildlife rests on a dual basis: trustee and police power. The two bases are distinct. In its natural state being incapable of having exclusive control exerted over it, wildlife was at common law considered to belong to no one but its use was common to the people. As representative of its people, ownership resides in the state for the purpose of regulation so that the common right of the people be equally protected. *Farris* v. *Arkansas State Game & Fish Comm'n,* 228 Ark. 776, 310 S.W.2d 231 (1948). The state may thus regulate the taking, subsequent use

and property rights that may be acquired in wildlife. *Lacoste* v. *Dept. of Conservation, supra* at 549. The trusteeship of the state, therefore, is not merely an expression of the right to regulate, *Maryland Dept. of Natural Resources* v. *Amerada Hess Corp.*, supra, and, indeed, the general police power of the state may be exercised to protect public health, safety and welfare without need of ownership in the subject matter.

The result is that wildlife is peculiarly subject to the power of the state which, within constitutional restraints, may regulate for the common benefit of its people. *New York ex rel Silz* v. *Hesterberg, supra* at 41. Indeed, the state is held to have an obligation, comparable to that of a fiduciary, to exercise its public trust in a fashion designed to promote fulfillment of the trust for the benefit of its people and for future generations. R.C.M. (1947) § 26-1501; *New York ex rel. Silz* v. *Hesterberg, supra* at 41-42; *New Jersey Dept. of Environmental Protection* v. *Jersey Central Power & Light,* 125 N.J. Super. at 102, 308 A.2d at 673-674; *Hayes* v. *Bowman,* 91 So.2d 795, 799 (Fla. 1957). See Sax, The Public Trust Doctrine, 68 Mich. L.Rev. 471, 477 (1969-1970). In sum, appellees submit that the peculiar power of the state over wildlife exists in consequence of a special relationship between a state and its people.[8]

[8] In Montana the trust is not a passive one. Article IX, Section 1(3) of the 1972 Constitution of Montana states: "The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources." A number of important legislative actions have been taken in this spirit. Thus in 1963 the Montana legislature enacted the Stream Preservation Act, R. C. M. (1947) § 26-1501 et seq., quite likely the first state law of its kind. Policy of the Act is stated as follows: "It is hereby declared to be the policy of the state of Montana that its fish and wildlife resources and particularly the fishing waters within the state are to be protected and preserved to the end that they be available for all time, without change, in their natural existing state except as may be necessary and appropriate after due consideration of all factors involved." § 26-1501. This enactment was followed by the Montana Environmental Policy Act of 1971, R. C. M. (1947) § 69-6501 et seq., the Utility Siting Act of 1973, R. C. M. (1947) § 70-801, and the Montana Strip Mining and Reclamation Act of 1974, R. C. M. (1947) § 50-1034 et seq. These statutes regulate economic developments within the state and have not brought about unusual economic prosperity. Indeed, 1974 average per capita income in Montana of $4,776 ranked thirty-fourth in the United States (A. 57).

II. Recreational Hunting Is Not A Fundamental Privilege and Immunity Protected By Article IV, Section 2

Appellants contend that the Montana license scheme for the hunting of elk violates the privileges and immunities clause of Article IV, section 2 of the Constitution, and that this case is governed by *Toomer* v. *Witsell,* supra. Appellants do not appear to assert that recreational hunting is a fundamental privilege and immunity; indeed they argue that privilege and immunity analysis need not focus on the nature of the activity. Brief of Appellants, pp. 21, 26. Rather, appellants argue, features other than the nature of the activity such as the presence of federal land in Montana and federal assistance to the State for wildlife restoration bring this case within the policy of Article IV, section 2.

Appellants' analysis is totally without support in the judicial history of the privileges and immunities clause. Indeed, from the earliest interpretation of the privileges and immunities clause by Mr. Justice Washington as Circuit Justice in *Corfield* v. *Coryell,* 6 Fed. Cas. 546 (No. 3230) (E.D. Pa. 1823), the courts have consistently focused on the nature of the right which is

asserted to fall within the protection of the clause. In a passage repeatedly approved by the Supreme Court as authoritative, Mr. Justice Washington construed the clause as relating to privileges and immunities which are fundamental in nature:

> The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.

6 Fed. Cas. at 551. The clause has never been construed by this Court to guarantee to nonresidents absolute equality in all rights and privileges accorded by a state to its citizens and the "fundamental right" analysis has been consistently followed. E.g. *Canadian Northern Ry.* v. *Eggen,* 252 U.S. 553 (1920); *Blake* v. *McClung,* 172 U.S. 239 (1898). And see *United States* v. *Wheeler,* 254 U.S. 281 (1920). Only where a fundamental privilege and immunity of citizenship is involved has the mandate of Article IV, section 2 required a more stringent judicial scrutiny and "substantial equality" in the treatment of residents and nonresidents. The initial inquiry therefore is into the nature of the right. *Toomer* is no exception. Discussing the right of South Carolina to discriminate against nonresident commercial shrimping operations within the three-mile territorial sea, the Court observed: "[I]t was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of

doing business in State B on terms of substantial equality with the citizens of that State." 334 U.S. at 396.

In line with the foregoing, the court below analyzed the right asserted:

> Whatever word may be used to describe plaintiffs' asserted rights—right, privilege, chance—the asserted right is recreational in character, and except for a few residents who live in exactly the right place, is expensive recreation. Critically examined, the right asserted here is, therefore, no more than a chance to engage temporarily in a recreational activity in a sister state, and even the chance is dependent upon the willingness of the people of the sister State to manage the subject matter of the recreation—the elk. The asserted right is not fundamental and is not protected as a privilege and immunity by Art. IV, §2 of the United States Constitution.

(A. 67-68). The right asserted here by appellants is recreational in nature and, indeed, hunting is declared by the Montana Supreme Court to be "sport." *State ex rel. Visser* v. *Fish & Game Comm'n,* 150 Mont. 525, 531, 437 P.2d 373, 376 (1968). Thus understood, the right asserted by appellants may be contrasted with that in *Toomer* v. *Witsell, supra,* which appellants say governs this case.

Appellants in *Toomer* challenged statutes of South Carolina relating to commercial shrimping in the state's three-mile ocean belt. A tax of ⅛ cent per pound was imposed by the state on raw shrimp taken in such waters, a license fee of $25 was imposed for each shrimp boat utilized by a resident as compared to a fee of $2500 for each boat owned by a nonresident, and all boats licensed to trawl for shrimp were required to dock at a South Carolina port and unload, pack, and

stamp their catch prior to shipment to another state. Appellants there contended that the purpose of the statutory scheme was not to conserve shrimp but to exclude nonresidents and thereby create a commercial monopoly for South Carolina residents. In the latter regard, the court observed that the practical effect of the statutory scheme was virtually exclusionary, noting that 100 nonresident boats had been licensed in the year prior to imposition of the $2500 license but that following enactment, no $2500 licenses had been taken out. 334 U.S. at 396-97, n. 28.

Rejecting the contention that state ownership permits such discrimination, the Court stated that the privilege of doing business in a state had long ago been extended to nonresidents on terms of substantial equality with residents. 334 U.S. at 396. Dealing with *McCready* v. *Virginia,* 94 U.S. 391 (1876), where "the Court actually upheld State action discriminating against commercial fishing or hunting by citizens of other States where there were advanced no persuasive independent reasons justifying the discrimination," 334 U.S. at 400, Chief Justice Vinson distinguished *McCready* on grounds that that case dealt with resident species and inland state waters as opposed to shrimp migrating through waters off the coast of South Carolina. Indeed, the Court noted that authority exists for the proposition that a state might have retained consumption and use of the shrimp for its people but that, like the situation in *Foster-Fountain Packing Co.* v. *Haydel, supra,* the state had not elected that course, permitting shipments to other states.

Toomer is plainly distinguishable from the case at bar which does not involve migratory species, and does not involve the virtual exclusion of nonresidents. In-

deed, the number of nonresident hunters licensed in Montana during the 1974 season stood at 31,406 and for the 1960-1970 period had increased at a significantly higher rate than the number of resident hunters (Defendants' Exhibit A, p. 5). The decision in *Toomer* plainly does not govern sport hunting. *American Commuters Ass'n* v. *Levitt,* 279 F.Supp. 40, 48 (S.D.N.Y. 1967), aff'd 405 F.2d 1148 (2d Cir. 1969).

Austin v. *New Hampshire,* 420 U.S. 656 (1975), upon which appellants also place reliance, is inapposite as well. There New Hampshire imposed a tax on out-of-state commuters earning income in the state but through a series of statutory exemptions absolved residents from payment of any tax on income earned in the State. Striking down the commuters tax as a violation of Article IV, section 2, the Court through Mr. Justice Marshall referred to *Corfield* v. *Coryell, supra,* "the first, and long the leading, explication of the Clause," as including among fundamental privileges "exemption from higher taxes or impositions." 420 U.S. at 661. Judicial recognition of the nonresident's opportunity to earn income in a state on terms of substantial equality goes back at least to *Ward* v. *Maryland,* 79 U.S. (12 Wall.) 418 (1871), and differs fundamentally from the opportunity to engage in sport hunting in a sister state.[9]

---

[9] State hunting and fishing licenses constitute incidents of regulation and charges granted for a special privilege and are not an exercise of the state's taxing power. The mere fact that revenue is obtained does not render the license fee a tax. The distinction between measures whose primary purpose is revenue for the general support of government and those whose primary purpose is regulation is well established. E.g., United States v. Butler, 297 U.S. 1, 59-61 (1936); Head Money Cases (Edye v. Robertson), 112 U.S. 580, 598 (1884); Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533, 549 (1869). And see Lacoste v. Dept. of Conservation,

Appellants point to the fact that federally owned land in Montana provides significant contribution to elk habitat, with most elk being taken by hunters on federal lands, and state also that the federal excise tax on sporting arms and ammunition results in significant apportionments to the State under the Pittman-Robertson Act.[10] While appellants state that these contributions provide a "policy back drop" underlying the privileges and immunities clause, Brief of Appellants p. 21, their precise bearing on application of the clause is not articulated.

We are unable to see how the presence of federally owned land providing significant big game habitat can transform recreational hunting into a fundamental right protected by Article IV, section 2.[11] Were such

263 U.S. 545, 550 (1924); Cities Service Co. v. Federal Energy Administration, 529 F.2d 1016, 1029 (TECA 1975); Rodgers v. United States, 138 F.2d 992, 995 (6th Cir. 1943). Hunting license fee payments are not permitted as tax deductions by the Internal Revenue Service. Rev. Ruling 60-366. And see Campbell v. Davenport, 362 F.2d 624, 627-629 (5th Cir. 1966). The Montana hunting licenses at bar, as found by the court below, serve the function of limiting hunter days and are a vital part of state management of the game pouulations (A.67). Hunting and fishing license fees collected in Montana are earmarked solely for purposes of fish and wildlife conservation, R. C. M. (1947) § 26-121, and are not available for the general support of state government. In this latter connection, see Head Money Cases (Edye v. Robertson), supra at 595; 58 I.D. 331, 341-342 (1943).

[10] Federal Aid in Wildlife Restoration Act, 50 Stat. 917 (1937), as amended, 16 U.S.C. §§ 669-669i (1970).

[11] A state may not exercise regulatory power over areas under exclusive federal legislative jurisdiction. Thus, for example, Montana has ceded to the United States sole and exclusive jurisdiction over the lands embraced within Glacier National Park. § 1, 38 Stat. 699 (1914), 16 U.S.C. § 163. However, except for such lands, upon its admission to the Union as a state Montana acquired sovereignty and political dominion over all other public lands of the United States within its borders and, as to such lands, the relationship of the United States is that of individual proprietor.

transformation possible, then the privileges and immunities clause would expand or contract depending upon the extent of federal ownership in a particular state,

Wilson v. Cook, 327 U.S. 474, 487 (1946); Surplus Trading Co. v. Cook, 281 U.S. 647, 650 (1930); Utah Power & Light Co. v. United States, 243 U.S. 389, 404 (1917); Fort Leavenworth R. R. v. Lowe, 114 U.S. 525, 526 (1885); Macomber v. Bose, 401 F.2d 545, 546 (9th Cir. 1968). "Where the Federal Government has no legislative jurisdiction over its land, it holds such land in a proprietorial interest only and has the same rights in the land as does any other landowner. In addition, however, there exists a right of the Federal Government to perform the functions delegated to it by the Constitution without interference from any source." Jurisdiction over Federal Areas Within the States, Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States, 21 (1956).

Absent federal legislation on the subject a state has exclusive power to control wild game within its borders. Carey v. South Dakota, 250 U.S. 118, 120 (1919). This Court last term in Kleppe v. New Mexico, 426 U.S. 529 (1976), upheld against constitutional challenge the Wild Free-Roaming Horses and Burros Act which protects feral animals on the public domain, holding that by virtue of the Property Clause of the Constitution, Article IV, section 3, clause 2, Congress exercises the powers of both a proprietor and a legislature over the public domain. With respect to public domain lands administered by the Bureau of Land Management and national forests administered by the Forest Service, as well as for military reservations, NASA and AEC lands, Congress has expressly declared that state fish and wildlife laws and regulations shall be applicable, inter alia, with respect to public hunting and fishing thereon. § 302(b), Federal Land Policy and Management Act of 1976, 90 Stat. 2763 (public domain and national forests); § 1, Multiple Use and Sustained Yield Act of 1960, 74 Stat. 215, 16 U.S.C. § 528 (national forests); § 202(b), Conservation Programs on Government Lands, 88 Stat. 1369 (1974), 16 U.S.C. § 670h(b) (public domain, national forests, military reservations, NASA, and AEC lands); § 4(1), Engle Act, 72 Stat. 29 (1958), 10 U.S.C. § 2671 (military reservations).

State hunting license regulations are applicable on public lands and there is no occasion for exercise of the Supremacy Clause because federal sovereignty is not threatened. See Federal Legislative Jurisdiction, Report Prepared for the Public Land Law Review Commission, U.S. Department of Justice, 37 Washington, D.C. (May 1969).

rights of nonresidents would vary from state to state—undermining the very purpose of Article IV, section 2, and certain states will have been admitted into the Union not as equal members but shorn of legislative powers vested in other states. See *Ward* v. *Race Horse*, 163 U.S. 504 (1896). Appellees urge the Court to decline appellants' invitation to interpret the privileges and immunities clause on the basis of factors other than the asserted right itself.

Similarly, the Pittman-Robertson Act, which imposes a federal excise tax on sporting equipment and apportions the proceeds to the states and territories for wildlife restoration, does not convert recreational hunting into a fundamental right protected by the privileges and immunities clause. The statute does contain a restriction on states wishing to benefit from apportionments of the federal excise. That restriction provides that no money shall be apportioned to a state until its legislature shall have passed a law prohibiting diversion of license fees paid by hunters for any purpose other than administration of the state fish and game department. § 1, 50 Stat. 917, 16 U.S.C. § 669. Plainly, Congress knows how to establish conditions. It simply has established no restriction in the Pittman-Robertson Act on resident-nonresident license differentials.[12] Indeed, not only has Congress failed to establish any such

[12] That Congress is capable of restricting resident nonresident differentials on federal lands for certain purposes is evident from 10 U.S.C. § 2671(a)(2) where base commanders of military reservations are directed to require that persons hunting, fishing or trapping on the federal installation or facility obtain necessary state licenses except that military personnel, on active duty at the installation for more than thirty days, need not acquire a state license if the state refuses to make such licenses available on terms not less favorable than the terms upon which a license is issued to residents.

condition (except as stated above for certain military personnel), only last year it affirmatively exempted state hunting and fishing license fees from certain prohibitions on discrimination. The Land and Water Conservation Fund Act of 1965, 78 Stat. 897, 16 U.S.C. §§ 460*l*-4-460*l*-11, designates portions of federal receipts from the Outer Continental Shelf leasing programs for matching grants to state and local units of government for acquisition and development of outdoor recreation lands. Section 6(f)(8) of the Land and Water Conservation Fund Act Amendments of 1976, 90 Stat. 1317, prohibits discrimination on the basis of residence with respect to property acquired or developed with assistance from the fund but state hunting and fishing license fees were excluded by Congress from the prohibition.[13]

Finally, appellants claim that comity among the states is threatened by license fee differentials between residents and nonresidents, Brief of Appellants, p. 25, and that the "corrosive implications" of the lower court's decision should not be permitted to stand. Id. at 26. Such assertions run headlong into the fact that hunting license differentials have long been an accepted

[13] The report of the House Committee on Interior and Insular Affairs states:

> An additional requirement is made which specifically prohibits discrimination on the basis of residence with respect to the use of property acquired or developed with assistance from the fund, with the exception that a reasonable differential fee may for admission or specific uses be charged to out-of-state versus local residents. This difference would be permitted in consideration of, and generally proportional to, the additional operating and maintenance expenses borne by the local managing agency. The restriction does not affect such activities as hunting and fishing license fees, which are controlled by State and local residency requirements .... H. Rep. No. 94-1021, 9-10 (1976).

feature of the special relationship between a state and its citizens. As expressed by Mr. Justice Frankfurter: "A State may care for its own in utilizing the bounties of nature within her borders because it has technical ownership of such bounties or, when ownership is in no one, because the state may for the common good exercise all the authority that technical ownership ordinarily confers." *Toomer* v. *Witsell,* 334 U.S. 385, 408 (1948) (concurring opinion). The practice, long sanctioned by the courts, *In re Eberle,* 98 Fed. 295 (C.C. Ill. 1899); *State* v. *Kemp,* 73 So. Dak. 458, 44 N.W. 2d 215 (1950), appeal dismissed for want of substantial federal question, 340 U.S. 923 (1951); *State* v. *Starkweather,* 214 Minn. 232, 7 N.W.2d 747 (1943); *Commonwealth* v. *Hilton,* 174 Mass. 29, 54 N.E. 362 (1899), has not been a *casus belli* among the states.[14] Some states have enacted reciprocity provisions which in varying degrees narrow the differential in hunting and fishing license fees. The Connecticut statute is a straight reciprocity provision permitting any nonresident residing in a New England state or in New York to procure a license for the same fee as a resident if the state in which he or she is a resident allows the same privilege to Connecticut residents. Conn. Gen. Stat. Ann. § 26-28(c) (1972). A variation on straight reciprocity is the New Jersey provision whereby a nonresident fee is established at the fee level paid by New Jersey residents in the nonresident's state, but not less than a specified amount. N.J. Stat. Ann. § 23:3-4 (1974). The Ohio legislature has authorized the chief of the Division of Wildlife to enter into agreements with

[14] In the court below the Montana license fee differential was supported by amicus curiae International Association of Fish and Wildlife Agencies, an organization whose government members include the fish and wildlife agencies of all fifty states.

other states to issue nonresident licenses where reciprocity is gained for Ohio residents. Ohio Rev. Code Ann. § 1533.10 (1975). See also Maryland Nat. Res. Code Ann. § 10-301 (1975); Miss. Code 1972 Ann. § 49-7-7. The significance of such statutes is that they evince the ability of states to resolve among themselves any difficulties concerning license differentials. Second, variations in the types of provisions suggest that there are important variables such as numbers of nonresident hunters, major sources of influx of nonresident hunters, status of big game populations, and quality of the hunting experience, which require flexibility on the part of legislatures in determining whether to extend and how to condition reciprocity.

Appellants would not only have this Court depart from long-established interpretation of Article IV, section 2, but also strike the laws of virtually every state, drastically altering existing state arrangements which have been a part of the national tradition since nearly the foundation of state government. Appellees submit that such a result is not required in this case by the privileges and immunities clause.

III. Residence Is a Permissible Classification As Here Utilized By The Montana Legislature to Regulate Recreational Taking of Wildlife

Appellants claim that Montana's license structure results in establishment of two classes of hunters based solely on residence, and that such classification constitutes invidious discrimination prohibited by the equal protection clause of the Fourteenth Amendment. The court below held that the asserted right to hunt for sport does not have a constitutional basis and is not fundamental for equal protection purposes. The court

also determined that the Montana license system bears a rational relationship to legitimate state purposes (A. 69).

The equal protection clause does not withdraw from the state the power to classify. The prohibition of the clause goes no further than the "invidious" discrimination, *Williamson* v. *Lee Optical Co., supra* at 489, and classification is deemed invidious only when found to be arbitrary, irrational, and not reasonably related to a legitimate state purpose. *McLaughlin* v. *Florida, supra* at 191. While state power with respect to wildlife within its borders is not unfettered by constitutional restraint, given the voluminous body of case law declaring the rights of the state in this area there can be no doubt that wildlife is peculiarly subject to the power of the state. The Court in *Toomer* v. *Witsell, supra,* while observing that the ownership doctrine is regarded as a fiction, states that the fiction expresses in legal shorthand "the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." 334 U.S. at 402. If such a power exists which is "important to its people," how can residence be deemed invidious? If, as conceded in *Foster-Fountain Packing Co.* v. *Haydel, supra,* Louisiana could have retained the shrimp within the state for consumption and use of its people, what classification other than residence did the Court have in mind? And if, as this Court stated last term in *Kleppe* v. *New Mexico, supra,* the States unquestionably have "broad trustee powers" over wild animals, who are the beneficiaries of the trust? Appellees submit that the Constitution does not require that the local wildlife resource be dedicated to the recreational enjoyment of residents and nonresidents alike.

The legislative acts of Montana enjoy a presumption of constitutionality. Since the state possesses peculiar powers over wildlife, powers which implicate public trust considerations, the presumption of constitutionality which ordinarily attends legislative acts is particularly robust in the present context. Restrictions on the number of hunters is essential for preservation of Montana's elk and other big game species (R. 194). As found by the court below:

> Not everyone may hunt elk. There are too many people and too few elk. If the elk is to survive as a species, the game herds must be managed, and a vital part of the management is the limitation of the annual kill. That limitation may be accomplished in many ways, but all of them involve in some degree a limitation upon hunter days. The hunter days may be controlled by pricing the license, by conducting lotteries, by limiting the length of the seasons, and by restricting the area of the hunt. Any controlling device . . . may deprive [the] hunter of any possibility of hunting elk.

(A. 67)

Applying holdings in the commercial fishing license cases to hunting for sport, appellants contend that discrimination by the state may be justified only by a showing that the differentials are cost supported by conservation expenditures borne by residents. Brief of Appellants, p. 72. Approaching the issue on cost of service principles, appellants' witnesses testified below as to the correct elements of direct and indirect costs which may properly be assigned in quantifying the effort of the State of Montana to maintain harvestable big game populations (R. 52 et seq.). Generally accepted accounting principles were invoked (R. 105), and anal-

ogies to public utility pricing models were tendered (R. 109, 403).[15]

But the instant case involves neither utility ratemaking principles nor Robinson-Patman concepts. Appellants either misconceive or dismiss the trustee interest in wildlife which is reposed in the state for the benefit of its people, and they are wide of the mark in invoking public utility accounting principles. Maintenance of municipal sewerage or water systems are governmental activities where a commodity or service produced is

[15] Appellants below offered two witnesses for the purpose of presenting testimony as to proper allocation to residents and nonresidents of costs incurred by the state in providing "hunting services" (R. 53). The witness Schaill, an economist specializing in public finance, testified that the cost to the state to provide "hunting services" was properly composed of direct costs (the annual Fish and Game Department budget) and indirect costs (total annual expenditures by the state for all purposes). On the assumption that all persons present in the state receive benefits from such indirect costs and should properly be assessed therefor, the witness determined that 31,000 nonresident hunters received 287,538 person-days of recreational experience while all Montanans received about 250 million person-days of benefits. "I assumed that the average Montanan stays in the State 50 weeks a year which is 350 days per resident so that Montana residents receive 719,000 times 350 days per year of benefits, some 251,650,000 person-days of benefit. Now if we add together the benefits enjoyed by [all] Montanans plus the person-days of benefits enjoyed by these nonresident hunters, we find out that nonresident hunters receive .1% of all the benefits of these indirect State expenditures. Therefore, they should properly be assessed .1% of the cost—the taxable cost of these expenditures" (R. 64-65). According to this witness, no other cost, forbearance or state interest may properly be considered in establishing price.

The witness Ness, a CPA, testified that establishment by the state of license fees should be governed by generally accepted accounting principles (R. 125), but he cautioned that one should not "become bogged down with some measurement or value of benefit" (R. 110).

generally priced so as to recover cost. Where utility prices are regulated, rates have traditionally been established under cost of service principles. By contrast, regulation by the state of hunting and fishing is in fulfillment of a public trust. Further, public utility services are readily distinguished as activities produced on a program basis by a single government agency, usually with the intention of being self-supporting (R. 109). Direct costs of producing such goods may be ascribed to and are variable with levels of output. In consequence, the costs associated with such programs would not exist but for sale of the particular service to the public. By contrast, the costs associated with maintaining favorable conditions for the production of big game populations cut across many government agencies, involve penalties to private landowners who provide critical winter habitat, and indeed have implications for the people as a whole to the extent that economic growth is restrained in the interest of environmental amenities.

Hunting is not the end product but a tool of wildlife management. The number of licenses issued, the fee level, the duration of the season, the bag limit are regulatory measures which cannot be isolated from resource management and denominated a sale of public goods. By their claim of unconstitutionality in the absence of cost justification, appellants effectively reject *in toto* thte beneficial interest of the people of the state under the ownership doctrine and, further, by putting the state to such proof, deny the presumption of constitutionality of state legislative acts.

The Montana legislature chose an economic means to limit the number of hunter days and the method simply cannot be deemed an arbitrary and capricious act by the legislature. Moreover, to sustain the license scheme as

a regulatory measure, the state need not demonstrate that methods chosen are indispensable to the effectiveness of the state's attempt to regulate the taking of elk and other big game species. Such a standard might be appropriate were the Court dealing with Indian treaty rights to take game. See *Tulee* v. *Washington*, 315 U.S. 681 (1942). The measure of the legal propriety of state regulations in such cases is distinct from the constitutional standard concerning state police power in non-treaty contexts. *Puyallup Tribe* v. *Department of Game*, 391 U.S. 392, 401 n. 14 (1968).

The reasonableness of residence as a classification in the instant case is apparent from the fact that Montana residents assist in the production and maintenance of big game populations through taxes and other economic penalties and forbearances. Thus, a substantial level of General Fund expenditures by state agencies directly or indirectly benefits wildlife. The General Fund supports annual expenditures for state parks utilized by sportsmen (Plaintiffs' Exhibit No. 1), for road systems providing access to hunting areas (R. 157, 335), for fire suppression activities on state and private forests to protect wildlife habitat (R. 167), for activities of the Montana Environmental Quality Council one of whose major objectives is maintenance and enhancement of fish and wildlife habitat (R. 163, 165), for enforcement of state air and water quality standards which enhance general recreational values and which benefit fish and wildlife habitat (R. 223, 224), for administration of the Montana Water Use Act of 1973 relating to reservation of water for private or state use (R. 276), for assistance by county sheriff's departments to enforce game laws (Defendants' Exhibit G, at 13), and for State Highway Patrol officers who assist

wildlife officers at game checking stations and in enforcement of game laws (Defendants' Exhibit G, at 7-10). Similarly, private ranch lands, especially in the mountainous western part of the state, provide elk, deer and other species with critical winter habitat necessary for survival (R. 46-47, 286). Such support constitutes a cost to the rancher in terms of consumption of stored forage and other depredations (R. 191, 373). Montana residents provide the major source of these expenditures which relate directly to the capacity to produce a fish and wildlife resource capable of sustaining annual harvests by resident and nonresident hunters. And these contributions by residents are made on a continuing basis. When such expenditures and contributions peculiar to residents are added to the peculiar power of the state over wildlife, it simply cannot be seriously maintained that the Montana classification based on residence is invidious.[16] The residence-based distinction impinges on no fundamental interest of nonresidents and serves to achieve the state objective of conserving wildlife. Cf. *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976).

A. *License Fee Differentials.* The legislative acts of the State of Montana enjoy a presumption of constitutionality. Moreover, the state enjoys wide discretion in

[16] The state also has an interest in controlling an important local food supply for its citizens. See Toomer v. Witsell, 334 U.S. at 409 (concurring opinion); Bayside Fish Flour Co. v. Gentry, 297 U.S. 422, 429-430 (1936); Geer v. Connecticut, 161 U.S. 519, 534 (1896); State ex rel Soffeico v. Heffernan, 41 N.M. 219, 67 P.2d 240, 244 (1937). Red meat harvested by hunters is of considerable value. A study calculated that 6,622,992 pounds of boneless deer meat was harvested in Montana during 1973. There also appears to be a correlation between beef and pork prices and resident license sales, particularly for deer. Defendants' Ex. G, App. B.

exercising its powers in the area of fish and wildlife conservation. A statutory classification impinging on no fundamental interest "need not be drawn so as to fit with precision the legitimate purposes animating it." *Hughes* v. *Alexandria Scrap Co.*, 426 U.S. at 813. The legislature was confronted with the fact that nonresident hunting in Montana was on the increase. In the period from 1960 to 1970 the number of Montana residents hunting within the state had increased by approximately 67 percent as compared to approximately 530 percent for nonresidents (A. 56-57). Indeed in 1974 Montana was the most frequently visited state by out-of-state hunters.[17] In choosing to rely on license fees the legislature adopted an economic tool to limit access. As the court below found, limitation of the annual kill may be accomplished in many ways but all of them involve in some degree a limitation upon hunter days (A. 67). The efficacy of the tool is evidenced in the fact that as the license fee for nonresidents has increased a reduction in the number of nonresident hunters has occurred in the subsequent year (R. 14, 15). Indeed the use of license fees constitutes a less restrictive device

[17] Michigan Natural Resources 27-28 (October 1975). Nonresidents are lured to Montana not only by the prospect of taking a prized trophy species such as elk but also by the prospect of greater success. Of the licenses sold in 1974 to residents of the other forty-nine states and eleven foreign countries, 15.5 percent and 13.9 percent went to hunters from California and Minnesota, respectively. Defendants' Ex. A, p. 13. Resident deer hunter success in those states during 1974 was 6.5 percent and 20.7 percent. Defendants' Ex. G, p. 4. By contrast, nonresidents succeeded on 69 percent of their deer licenses in Montana, not only exceeding the success rate in their home states but surpassing as well the 48 percent success rate for Montana residents in 1974. Similarly, nonresidents succeeded on 15 percent of their elk licenses in 1974 as compared with the resident success rate of 11 percent. Defendants' Ex. A, p. 7.

than limitation of numbers of hunters through a drawing. In a related context this Court has noted that any realistic judgment whether a given state action unreasonably trespasses on national interests must consider the consequences to the state if its action were disallowed. *A & P Tea Co.* v. *Cottrell*, 424 U.S. 366, 373 (1976). Were such license differentials disallowed Montana would essentially have two choices: it could impose virtually the same fee on residents as on nonresidents or it could allocate licenses on the basis of population. Were it to choose the former the legislature might reasonable conclude that the interest of citizens in supporting big game populations for recreational hunting would disappear as indicated by the court below (A. 70-71).[18] If the latter alternative were chosen Montana residents would be accorded the privilege of taking .34 percent of elk licenses issued (A. 71), again with serious effect on the motivation of Montana citizens to underwrite game management programs.[19] Under appellants' logic the very success of a State in enhancing big game populations would be self-defeating since the State would naturally be flooded with nonresident applications. Under any test, strict scrutiny or

[18] Per capita income for Montana residents ranked thirty-fourth in the United States for the year 1974 (A. 57).

[19] Appellants claim that reliance on political support as a factor in upholding legislative classification is "inherently inappropriate." Brief of Appellants, p. 46. *Maricopa Hospital* v. *Maricopa County*, 415 U.S. 250 (1974), relied upon by appellants, involved validity of a residence requirement in connection with free county medical care. That interest can hardly be deemed comparable to the interest in recreation hunting for elk asserted here. In any event, reliance on political considerations in equal protection analysis is unexceptional. San Antonio School District v. Rodriguez, 411 U.S. 1, 51-52 (1973); Salyer Land Co. v. Tulare Water District, 410 U.S. 719, 732 (1973).

rational basis, preservation of the big game population constitutes a compelling interest of the State.

B. *The Combination License.* Under the statutory scheme adopted by the legislature nonresidents who wish to hunt elk are required to purchase a combination license for $225 which entitles the licensee to hunt one elk, one deer, one bear, game birds, and to fish with hook and line. (A. 37-38).

The legislature might well have concluded that the following factors necessitated the combination license requirement for nonresident elk hunters: that nonresidents as a class hunt in larger groups and that "license swapping" is more likely to occur in such hunting parties (R. 237); that a substantially higher number of nonresidents hunting elk utilize the services of outfitters than do residents (R. 248);[20] that in attempting to enforce its conservation laws Montana has adopted the "equal responsibility" law which makes outfitters and guides equally responsible for game violations committed by persons in their hunting parties if such violations are not reported; that the equal responsibility law has significant impact in reducing violations in the backroad areas of Montana which cannot be effectively policed by game wardens and that to preserve such an adjunct warden force it is desirable to fairly protect outfitters and guides from liability for unlicensed hunting (R. 287-288). These factors are not rank speculation but rather matters on which testimony was taken in the court below. Nor is the mandatory enlistment of outfitters and guides as a surrogate enforcement arm of the state a question of mere administrative convenience as in *Stanley* v. *Illinois,* 405 U.S. 645, 657

[20] The three outfitters who testified at trial stated that virtually all their clients were nonresidents (R. 141, 281, 307).

(1972), but rather serves a substantial state interest. The residence-based distinction in connection with the combination license cannot be said to lack any rational basis.[21] A statutory classification impinging on no fundamental interest does not offend the equal protection clause merely because it is not made with mathematical precision. *Hughes* v. *Alexandria Scrap Corp.,* supra at 813. Indeed, in the field of wildlife conservation this Court has upheld state measures prohibiting conduct otherwise neutral which tends to effectuate the local game laws and render evasion more difficult. *Bayside Fish Flour Co.* v. *Gentry,* 297 U.S. 422, 426 (1936); *New York ex rel. Silz* v. *Hesterberg,* 211 U.S. 31, 39-40 (1908). Appellees submit that the combination license provisions relate directly to enforcement of the game laws and cannot be said to be without rational basis.

CONCLUSION

For all the reasons set forth above, appellees submit that the decision below should be affirmed.

Respectfully submitted,

PAUL A. LENZINI
CHAPMAN, DUFF and PAUL
1730 Pennsylvania Avenue, N.W.
Washington, D. C. 20006

Attorney for Appellees

May 7, 1977

[21] Appellants claim that they wish to hunt only elk. However, the evidence indicates that, as a class, nonresident hunters who have purchased a combination license hunt deer on the license fully as much as elk. Defendants' Exh. A, p. 10.

APPENDIX

APPENDIX

The following is a list of current state sport hunting license fees for residents and nonresidents, respectively. (Note—The dollar amounts reflect the comparative fees for general hunting licenses or big game hunting licenses or licenses to hunt those game species to which a holder of the Montana combination license is entitled, depending upon the particular state's licensing method).

Alabama—resident $5; nonresident provision repealed in 1975, former law required $25.15. Ala. Code tit. 8, §§ 30(1), 31 (1975).

Alaska—resident $7 (hunting and trapping); nonresident $200 (hunting and trapping). Alaska Stat. § 16.05.340 (1975).

Arizona—resident $26; nonresident $130. Ariz. Rev. Stat. § 17-333 (1975).

Arkansas—resident $1.50; nonresident $25. Ark. Stat. Ann. § 47-201 (1964).

California—resident $10; nonresident $35. Cal. Fish & Game Code § 3031 (1974).

Colorado—resident $39; nonresident $175. Colo. Rev. Stat. § 33-4-102 (1976).

Connecticut—resident $4.35 (hunting and trapping); nonresident $13.35 (hunting only). Conn. Gen. Stat. Ann. § 26-28 (1972).

Delaware—resident $5.20 (hunting and trapping); nonresident $25.25 (hunting and trapping). Del. Code tit. §§ 504, 508 (1974).

Florida—resident $7; nonresident $26. Fla. Stat. Ann. tit. 26, § 372.57 (1974).

Georgia—resident $3.25; nonresident $25. Ga. Stat. Ann. § 45-203 (1976).

Hawaii—resident $5; nonresident $10. Haw. Rev. Stat. tit. 12, § 191-2 (1961).

Idaho—resident $16; nonresident $150. Idaho Code §§ 36-406, 36-407, 36-409 (1976).

Illinois—resident $3; nonresident same fee as that charged residents of Illinois by state in which applicant resides, but not less than $15. Ill. Ann. Stat. Ch. 61, § 3.2 (1976).

Indiana—resident $3.25 (hunting and trapping); nonresident $45.50 (hunting and trapping). Ind. Code Ann. § 14-2-7-5 (1973).

Iowa—resident $5; nonresident $25. Iowa Code Ann. § 110.1 (1975).

Kansas—resident $3; nonresident $15. Kan. Stat. § 32-104a (1972).

Kentucky—fees prescribed by the Department of Fish and Wildlife Resources. Ky. Rev. Stat. Ann. § 150.225 (1970).

Louisiana—resident $10; nonresident $45, unless changed by the Wildlife and Fisheries Commission. La. Rev. Stat. (1950) tit. 56, § 104.

Maine—resident $7.50; nonresident $60.50. Me. Rev. Stat. tit. 12, § 2401 (1976).

Maryland—resident $8; nonresident $30.50 or a sum equal to that charged by the nonresident's home state for a similar license, whichever is greater. Md. Nat. Res. Code Ann. § 10-301 (1975).

Massachusetts—resident $8.25; nonresident $30.25. Mass. Gen. Laws Ann. ch. 131, § 11 (1974).

Michigan—resident $5; nonresident $25. Mich. Stat. Ann. § 13.1356 (1973).

Minnesota—resident $10; nonresident $60. Minn. Stat. Ann. § 98.45 (1976).

Mississippi—resident $5 (hunting and fishing); nonresident $25 (hunting only), provided that fee for nonresident hunting license shall not be less than the fee charged a Mississippian for a nonresident hunting license in applicant's state. Miss. Code Ann. §§ 5871, 5872 (1972).

Missouri—fees set by Conservation Commission. Mo. Ann. Stat. § 252.020 (1945).

Montana—resident $30; nonresident $225. Mont. Rev. Code Ann. § 26-202.1 (1975).

Nebraska—resident $4.50; nonresident $100. Neb. Rev. Stat. § 37-204 (1972).

Nevada—resident $10 (deer and elk); nonresident $50 (deer only, nonresident not permitted to hunt elk). Nev. Rev. Stat. § 502.240 (1973).

New Hampshire—resident $6.25; nonresident $45. N.H. Rev. Stat. Ann. § 214.9 (1973).

New Jersey—resident $10; nonresident same as fees charged to New Jersey residents in applicant's state, but not less than $25. N.J. Rev. Stat. Ann. § 23.3-4 (1975).

New Mexico—resident $22.50; nonresident $125.25. N.M. Stat. Ann. § 53-3-6 (1973).

New York—resident $5; nonresident $52. N.Y. Envir. Conserv. Laws § 11-0715 (1976).

North Carolina—resident $3.50; nonresident $5. N.C. Gen. Stat. § 113-96.1 (1975).

North Dakota—resident $7; nonresident $50. N.D. Cent. Code § 20.1-03-12 (1975).

Ohio—resident $4; nonresident $30, except as provided under § 1533.91, whereby Chief of Division of Wildlife may enter into agreements with other states to issue nonresident licenses for fees charged Ohio residents and vice versa. Ohio Rev. Code Ann. § 1533.10 (1975).

Oklahoma—resident $10; nonresident $50. Okla. Stat. Ann. tit. 29, § 4-112 (1974).

Oregon—resident $5; nonresident $50, however resident of state bordering Oregon may obtain licenses for $10 provided that Oregon resident may obtain a similar fee in applicant's state. Or. Rev. Stat. § 497.110 (1971).

Pennsylvania—resident $8.25; nonresident $40.35. 34 Pa. Cons Stat. Ann. § 1311.302 (1975).

Rhode Island—resident $3; nonresident $10. R.I. Gen. Laws § 20-27-10 (1972).

South Carolina—resident $6; nonresident $25. S.C. Code § 28-312 (1971).

South Dakota—resident $27 (all big game, including elk); nonresident $50 (all big game, *excluding* elk which nonresident not permitted to hunt). S.D. Compiled Laws Ann. § 41-6-16, *et seq.* (1976).

Tennessee—resident $7.50; nonresident $7.50. Tenn. Code Ann. § 51-203 (1976).

Texas—resident $5.25; nonresident $37.50. Tex. Parks and Wild. Code Ann., § 42.012 (1973).

Utah—resident $7; nonresident $75. Utah Code Ann. § 23-19-22 (1975).

Vermont—resident $5; nonresident $40.50. Vt. Stat. Ann. tit. 10, §§ 4255, 4256 (1973).

Virginia—resident $5; nonresident $20. Va. Code § 29-54 (1974).

Washington—resident $7.50; nonresident $60. Wash. Rev. Code Ann. §§ 77.32.104, 77.32.131 (1975).

West Virginia—resident $5 (hunting and trapping); nonresident $30 (hunting only). W. Va. Code §§ 20-2-39, 20-2-43 (1975).

Wisconsin—resident $12; nonresident $170. Wisc. Stat. Ann. §§ 29.10, 29.12, 29.105 (1974).

Wyoming—resident $25 (deer, elk and black bear); nonresident $205 (deer, elk, black bear and fishing). Wyo. Stat. § 23.1-33 (1975).

No. 76-1150

Supreme Court of the United States

OCTOBER TERM, 1976

LESTER BALDWIN, RICHARD CARLSON, JEROME J. HUSEBY, DAVID R. LEE, and DONALD J. MORIS,

Appellants,

v.

FISH AND GAME COMMISSION OF THE STATE OF MONTANA; WESLEY WOODGERD, Director of the Department of Fish and Game of the State of Montana; ARTHUR HAGENSTON; WILLIS B. JONES; JOSEPH J. KLABUNDE; W. LESLIE PENGELLY; and ARNOLD REIDER, Commissioners of the Fish and Game Commission of the State of Montana,

Appellees.

ON APPEAL FROM THE U. S. DISTRICT COURT
DISTRICT OF MONTANA
BUTTE DIVISION

REPLY BRIEF OF APPELLANTS

JAMES H. GOETZ
Goetz & Madden
P.O. Box 1322
Bozeman, Montana 59715
Attorney for Appellants

TABLE OF CONTENTS

CITATIONS

Cases:

Cases (Continued,

Statutes:

Miscellaneous:

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1150

LESTER BALDWIN, RICHARD CARLSON, JEROME L. HUSEBY, DAVID R. LEE, and DONALD J. MORIS,

Appellants,

-vs-

FISH AND GAME COMMISSION OF THE STATE OF MONTANA; WESLEY WOODGERD, Director of the Department of Fish and Game of the State of Montana; ARTHUR HAGENSTON; WILLIS B. JONES; JOSEPH J. KLABUNDE; W. LESLIE PENGELLY; and ARNOLD REIDER, Commissioners of the Fish and Game Commission of the State of Montana,

Appellees.

ON APPEAL FROM THE U. S. DISTRICT COURT
DISTRICT OF MONTANA
BUTTE DIVISION

REPLY BRIEF OF LESTER BALDWIN, et al. APPELLANTS

I. INTRODUCTION

At issue is the Montana big game hunting license scheme which substantially discriminates against nonresidents. Appellants, nonresident hunters and a resident hunting guide, challenge the discrimination on the basis of the privileges and immunities clause, Art. IV, Sec. 2, and the equal protection clause, Am. 14.

Perhaps the central issue in the present case is whether the Montana statutory scheme, which cannot reasonably be justified on any cost basis, can nevertheless survive the instant constitutional challenge on the basis that political support of the local citizenry for the game management program may evaporate in the absence of discrimination against nonresident hunters. Appellants have cited the egregious implications which follow from the District Court's rationale. Memorial Hospital v Maricopa County, 415 U.S. 250 (1974), "[t]he state may not employ an invidious discrimination to sustain the political viability of its programs."

415 U.S. at 266.[1]

Nothing more than a passing reference to the political rationale of the District Court appears in the brief of Appellees (p. 33). No authority is advanced to support the proposition that an otherwise unjustifiable discrimination may survive a constitutional challenge because local political support may be eroded in the absence of the discrimination. Given the obvious care taken by Appellees in the construction and wording of their answer brief, the failure to support the rationale of the District Court cannot be discounted as an inadvertent omission. Rather, this omission appears to be virtually an admission that the rationale of the District Court is indefensible.

---

[1]Aside from the inherent inappropriateness of justifying a discrimination on political grounds, Appellants also have emphasized that the record is barren of any evidence that support of Montana citizens for the game management program would decrease in the absence of the discrimination. Absent such evidence, it was highly inappropriate for the District Court to speculate on such factor. (See Appellants' opening Brief, pp. 51-55.)

Viewed from this perspective it appears that Appellees, rather than standing on the reasoning of the District Court, seek to re-open the issue of whether the instant discrimination is justifiable on factors other than the imagined vicissitudes in local political support. In this connection, the brief of Appellees, while referencing many points in the record which arguably establish a conceivable basis for the discrimination, fails to set forth the evidence in a systematic enough manner to enable the reader to conclude that the discrimination is factually defensible. For example, Appellees seek to justify the combination license requirement for nonresidents[2] by briefly alluding to the illegal practice of

---

[2]The big game "combination license" is specifically defined in Appellants' opening Brief (p. 5, fn. 2). Essentially, Montana allows its residents to purchase elk licenses solely, but requires non-residents who wish to hunt for elk to purchase a combination license entitling them to one elk, one deer, and one black bear. (The pre-1976 combination license included one elk and two deer.)

"license swapping" (Appellees' brief, p. 7). The brief implies that nonresidents tend to engage in "license swapping" to a greater extent than residents and that the combination license is designed to frustrate that practice. The full record, however, indicates that residents may well engage in illegal license swapping as much or more than nonresidents (Tr. p. 258), and that the incidence of swapping, an illegal practice, may actually be lower for nonresidents because nonresidents tend to a greater degree to use the services of outfitters who are equally responsible for enforcing the game laws. (Tr. pp. 253, 254.) Therefore, the practice of requiring the combination license for nonresidents only finds no reasoned support from the "license swapping" phenomenon.

Instead of attempting to develop these factual issues in reasonable detail, the Appellants fall back on their entitlement to the presumption of consitutionality. However, even considering the presumption of constitutionality, the District Court, after compiling an extensive factual record, unanimously found the discrimination unjustifiable on the factual grounds

now urged by Appellees. The two-member majority found: "On the consideration of ...[plaintiffs'] evidence, the state's evidence opposing it, and with due regard to the presumption of constitutionality, ...the ratio of 7.5 to 1 cannot be justified on any basis of cost allocation." (Emphasis added.) (A. 62, 63.)[3] The factual points advanced by Montana to support the combination license requirement were not discussed by the majority, but it is clear that the majority found such arguments also untenable.[4]

---

[3]Dissenting Judge Browning agreed with the two majority judges on this point. (A. 74)

[4]Judge Browning summarized this in his dissent as follows:

> The majority does not discuss the other purposes advanced by the state to support the discrimination--implying (and I agree) that there is no reasonable relationship between the discriminatory license fee and any of the other purposes advanced by the state. Each such justification is shown by the record to be either logically or factually unsupportable. (A. 74, 75.)

It is undoubtedly the case that the reason the majority turned to the political justification to support the license discrimination is because the discrimination is not supportable on the grounds advanced by the state. Given this posture,[5] mere passing reference to points in the record, coupled with reliance on the presumption of constitutionality, will not suffice.

---

[5] See Vol. 5A Moore's Federal Practice, Par. 52.12, p. 2762:

> Where there is a direct appeal from a district court to the Supreme Court and the latter Court is, therefore, sitting as an initial appellate court, it performs the same duty in determining the sufficiency of the evidence to support the findings that a court of appeals does in the bulk of appeals that go initially to this intermediate appellate court (citing United States v. United States Gypsum Co. (1948), 333 US 364, and other cases). And in determining the sufficiency of the evidence Rule 52(a) is applicable, and hence factual findings are not to be set aside "unless clearly erroneous," with "due regard . . . given to the opportunity of the trial court to judge of the credibility of the witnesses."

Appellees attempt to argue throughout their brief that Montana's discrimination against non-residents is generally a reasonable device designed to accomplish conservation purposes. Appellees state: "Hunting licenses are universally recognized as an economic control mechanism whereby a state may regulate the harvest of its wildlife resources." (Appellees' brief, p. 11.) This "universal" recognition is not at all as clear as the statement would indicate. In the District Court the State of Montana tried to justify the differences between license fees for residents and nonresidents on a cost basis, not a conservation basis. In any event, in the 1975 season, the fee for an elk license was $4,00 for the Montana resident. (A. 53.)[6] The fee for a nonresident (combination) license was $151.00. (A. 53.)[7] It cannot seriously be argued that the $4 fee in 1975 for a resident elk license was an "economic control mechanism

---

[6]In 1976 and presently it is $9.00. (A. 54.)

[7]In 1976 and presently it is $225.00. (A. 55.)

whereby a state may regulate the harvest of its" game. Nor can the present fee of $9 be so viewed. Virtually no hunters will be discouraged by such low fees, and there is no evidence in the record which would indicate such disincentive.

On the other hand, it may be the case that the high fees charged nonresidents do serve as a disincentive which curbs the number of nonresident hunters. The result is that Montana may be using the license fee to discourage nonresidents under the guise of conservation of the resource while making no attempt to restrict its own residents. This Court decided Douglas v Seacoast Products, Inc. 429 U.S. ____, 52 L Ed. 2d, 304, on May 23, 1977, finding invalid a similar state scheme, stating:

---

[8]Indeed, Appellees argue: "[t]he efficacy of the tool [higher license fees for nonresidents] is evidenced in the fact that as the license fee for nonresidents has increased a reduction in the number of nonresident hunters has occured in the subsequent year (R. 14, 15)." (Appellees' brief, p. 32.)

> Appellant claims that the challenged statutes have a legitimate conservation purpose. He argues that §81.1 is a valid response to the grave problem of overfishing of American marine stocks by foreign fleets....
>
> The claims are specious. Virginia makes no attempt to restrict the quantity of menhaden caught by her own residents. A statute that leaves a state's residents free to destroy a natural resource while excluding aliens or non-residents is not a conservation law at all.
>
> (Fn. 21, 52 L Ed. 2d at 320.)

Thus, there appears to be at least some question whether Montana's hunting license discriminatory system is designed to accomplish conservation of the resource. In any event, the imposition of de minimis fees on residents, while gouging the non-residents is not consistent with the principle established in Douglas v Seacoast Products, Inc., supra.[9]

---

[9]It should also be noted that Montana law contains other provisions which appear to be more directly designed to conserve the resource. For instance, not more than 17,000 nonresident big game combination licenses may be sold in any one license year. (Sec. 26-202.1(4) R.C.M.) (No numerical restriction is placed on resident elk or deer licenses.) This provision is not at issue in this case for the reason, in part, that the number of nonresident hunters does not approach this limit. However, it appears similarly faulty because it also attempts to accomplish conservation at the expense of the nonresident while wholly ignoring the problem of resident hunters. At least, however, this numerical restriction is a direct attempt to foster conservation.

II. MONTANA CANNOT SUPPORT ITS DISCRIMINATION AGAINST NON-RESIDENTS ON THE THEORY THAT THE STATE "OWNS" THE WILDLIFE

Appellees attempt to find support for Montana's discrimination against non-residents on the theory that the state "owns" the wildlife. It is not clear how far Appellees would carry the ownership theory. Certainly they fall short of arguing that because the state owns the wildlife it can do with it what it wants. Appellees do, however, argue that the "ownership doctrine remains alive and well," (Appellees' brief, p. 12) and that, as a consequence of such doctrine, the state has a "special power" (Id., p. 8) over its wildlife and a "peculiar

power...over wildlife...in consequence of a special relationship between the state and its people" (Id., p. 14). This all seems to amount to a position that Montana's power to regulate game is stronger than its routine police powers. This position cannot be sustained in light of this Court's recent decision in Douglas v Seacoast Products, supra:

> In any event, "[t]o put the claim of the State upon title is," in Mr. Justice Holmes' words, "to lean upon a slender reed." Missouri v. Holland, 252 U. S. 416, 434 (1920). A State does not stand in the same position as the owner of a private game preserve and it is pure fantasy to talk of "owning" wild fish, birds or animals. Neither the State nor the Federal Government, any more than a hopeful fisherman or hunter, have title to these creatures until they are reduced to possession by skillful capture. Ibid; Geer v. Connecticut, supra, 161 U. S., at 539-540 (Field, J., dissenting). The "ownership" language of cases such as those cited by appellant must be understood as not more than a 19th-century legal fiction expressing "the importance of its people that a State have power to

> preserve and regulate the exploitation of an important resource." Toomer v. Witsell, 334 U. S. 385, 402 (1948); see also Takahashi v. Fish & Game Commission, 334 U.S. 410, 420-421 (1948). Under modern analysis, the question is simply whether the State has exercised its police power in conformity with the federal laws and Constitution. (52 L Ed. 2d at 319, 320.) (Emphasis added.)

Thus, the present case presents no special, or peculiar, factors which entitle Montana's discrimination against nonresidents to a greater presumption of validity than that of the typical case involving a Federal Constitutional challenge to the exercise by a state of its routine police powers.

III. MONTANA'S HUNTING LICENSE SCHEME IS NOT IMMUNE FROM THE APPLICATION OF THE PRIVILEGES AND IMMUNITIES CLAUSE.

It is argued by Appellees that the privileges and immunities clause, Art. IV, Sec. 2, is not applicable to Montana's discriminatory hunting license scheme because the right involved is not a "fundamental" one. Toomer v Witsell, 334 U. S. 385 (1948) found invalid the discriminatory

commercial shrimping license scheme of South Carolina with no explicit finding that the right involved was "fundamental." The interest involved in Toomer is the right to pursue a common commercial calling--similar to an interest in employment. It can be said from recent decisions of this Court in the equal protection context that the right to employment is not "fundamental." Massachusetts Board of Retirement v Murgia, 427 U.S. 307 (1976).[10] Thus, the interest focused upon in Toomer cannot be said to have been (or to be) a "fundamental" interest. Nevertheless, the privileges and immunities clause was invoked. Furthermore, Austin v New Hampshire, 420 U.S. 656 (1975) invalidated New Hampshire's commuter tax on the basis of the privileges and immunities clause, Art IV, Sec. 2. Again, there was no quest in that case for an infringement of a right thought to be "fundamental." Appellees argue that the privileges and

---

10 While the Murgia case dealt with the issue of government employment, the implications of the Court's opinions carry over to all employment.

immunities clause has long been held to require exemption for nonresidents from "higher taxes or impositions" citing Corfield v Coryell 6 Fd Cas. 546 (No. 3230) (E.D. Pa. 1823). This language in Austin can hardly be construed as limiting the application of the privileges and immunities clause to only those rights which are "fundamental."

In any event, the present Montana licensing scheme is a "tax," or certainly an "imposition," within the meaning of the privileges and immunities clause. Appellees argue that state hunting licenses constitute incidents of "regulation" and "are not an exercise of the state's taxing power." (Appellees' brief, p. 19, fn. 9.) Arguing that the distinction is well established between measures whose primary purpose is revenue for general support of government and those whose primary purpose is regulation, they cite United States v Butler, 297 U. S.1, 59-61 (1936). For all practical purposes this holding in the Butler case was eviscerated in Steward Machine Co. v Davis, 301 U. S. 548 (1936), a case which rejected a

challenge to the payroll tax of the Social Security Act, 42 U.S.C. c. 7 (supp), Title IX. Appellees also rely on Campbell v Davenport 362 F 2d 624 (1966) for the proposition that an assessment is a tax if the primary purpose is to raise revenue but not a tax if not to raise revenue. Campbell v Davenport, supra, actually found a sizeable Texas primary filing fee a tax rather than a fee because its primary purpose was to raise revenue rather than to regulate (as, for instance, to preclude nuisance candidates).

In the present case, only 2% of the revenue of the Montana Fish and Game Department comes from the general fund of Montana. (Pl. Ex. 1) The leading source of operating revenue of that Department is from license fees. (Id.) Approximately two-thirds of license fees come from nonresidents even though nonresidents constitute only approximately 13% of total hunters.[11] (Tr. p. 34.)

---

[11]Don Brown testified that in 1974-1975 there were approximately 198,411 residents licensed to hunt and 31,406 nonresidents licensed to hunt. (Def. Ex. A, Tr. 26, p. 6 of Exhibit.)

In 1975 the resident paid only $4.00 for an elk license. Now the resident pays $9.00 (A. 54). It is clear that the Montana license structure is not solely a regulatory device and is not solely or directly a conservation device. It is likewise clear that nonresident hunters are compelled to subsidize inordinately the operations of the Montana Fish and Game Department. For these reasons, the nonresident hunting fee charged by Montana must be considered a "tax" or "imposition" within the meaning of the privileges and immunities clause.

Both Toomer v Witsell, supra, and Mullaney v Anderson, 342 U.S. 415 (1952) appear to take this approach, particularly in requiring that the impositions on nonresidents bear some reasonable relationship to additional enforcement burdens caused by nonresidents to the state or to "conservation expenditures from taxes which only residents pay." Mullaney v Anderson, 342 U.S. at 417. (Emphasis added.)

Appellees, for obvious reasons, attempt rigidly to fit this case into

neat categories and attempt to hinge the entire question on whether sport hunting can be considered a fundamental right. What really is at stake in the present case is the right of a person to travel into a sister state and enjoy that state's resources on a substantially equal basis. This does not mean that the resident should be compelled to subsidize the nonresident through local tax contributions. Thus, some reasonable additional fee can be assessed the nonresident on the basis of Toomer v Witsell, supra. However, Montana's scheme of gouging the nonresident to subsidize an artificially low resident contribution does not comport with the privileges and immunities clause.

Finally, the paramount purpose of the privileges and immunities clause--to promote comity among the states--must be considered. Austin v New Hampshire, supra. The erection of artificial economic barriers at the borders of the states so that only relatively wealthy nonresidents can enjoy what the sister

state has to offer cuts against this fundamental purpose.[12]

IV. THE MONTANA HUNTING LICENSE SCHEME DEPRIVES APPELLANTS OF THEIR RIGHTS TO EQUAL PROTECTION OF THE LAWS.

Appellees respond to Appellants' contention that the Montana scheme violates the equal protection clause by arguing that the Montana discrimination is a reasonable approach to the goal of conservation of the wildlife.

As noted in the Introduction, little attempt is made by Appellees to support the rationale of the District Court--that the discrimination is justified because the Montana legislature might reasonably conclude that the

---

[12]Appellees argue that elk hunting in Montana is expensive for the nonresident citing a figure of $1450 in expenses (Appellees' brief, p. 3, fn. 1). For the frugal person, however, it can be relatively cheap. (Deposition of Donald Moris, p. 14: he indicated that he spent approximately $30 for gas and only $4 per night for a motel room, while hunting in Montana.)

political support of the local citizenry might evaporate in the absence of the discrimination. Rather, Appellees have attempted to re-open the factual arguments. The District Court unanimously rejected the factual arguments (See pp. 4-6, this brief). These findings of the District Court will not ordinarily be disturbed in the absence of manifest error (See fn. 5, this brief). No such clear error has been demonstrated by Appellees.

In this connection, it should be noted that a Three-Judge Federal Court has recently ruled on the big game licensing scheme in New Mexico, Terk v Gordon, ____ F. Supp. ____; (D. N.M. No. 74-387-M Civil, dec. August 25, 1977). The Court sustained in part and voided in part New Mexico's license scheme. The Court found the privileges and immunities clause inapplicable based on a similar argument made by Appellees in the present case.[13] The Court also

[13]Appellants, for the reasons stated in Section III of this brief, believe that decision is erroneous.

sustained New Mexico's fee differential,[14] finding that "...the State has made a sufficient showing that nonresidents receive the benefits of state general fund expenditures which justify the fee differential." (Slip Opinion, p. 13.) The Court found unconstitutional the New Mexico system for allocation of nonresident licenses to hunt certain exotic species which either excluded or severely restricted nonresident licenses, observing:

> It is admitted that the purpose of the allocation policy of the Game Commission is to preserve hunting of three species (Desert Bighorn; Oryx and Ibex) for New Mexico citizens. We find no conservation considerations involved and nonresidents are not a source of evil. From the Bighorn's point of view, the residency of the hunter is not relevant. (Slip Opinion, p. 14.)

[14]The ratios between the resident and nonresident fees for various species in New Mexico are generally much smaller than Montana's. E.g., big game: nonresidents--$50.75, residents--$8.00; elk: nonresidents--$75.50, residents--$15.50; ibex: nonresidents--$300.50, residents--$50.50. (Slip Opinion, p. 2.)

This appears consistent with the holding of this Court in Douglas v Seacoast Products, supra, that restrictions on nonresidents while leaving the residents free to destroy the resource cannot be considered a legitimate conservation program.

On the license fee differential issue, the New Mexico case is different from the present case in that the New Mexico Court expressly found that the state had justified the fee differential on a cost basis. In the present case the explicit finding was unanimously to the contrary. Significantly the Court in Terk did not look to other factors, such as a political justification, in its analysis of the Constitutional issues. The finding in Terk, that the restriction of nonresidents in allocating licenses for certain rare species is unconstitutional because it constitutes favoritism of state residents without a legitimate conservation purpose, is applicable to the case at hand.

It is particularly difficult to see how Montana's requirement of a combination license for nonresidents fosters a conservation purpose or any other

legitimate state purpose. Appellees refer to the statement of a Montana outfitter who testified that he would hate to take a hunter into the field who had "just a deer license or an elk license" because he would be afraid that the hunter would mistake one species for the other and take the game illegally. (Appellees' brief, p. 7, Tr. 287, 283.) This does not explain why Montana includes black bears in the required nonresident combination license. It is pretty difficult to take by mistake a black bear while hunting for a deer or an elk, particularly when the black bear is hibernating during a good part of the big game season. (Tr. p. 296) Moreover, nothing precludes an outfitter from requiring of his hunters any combination of licenses he feels necessary as a precondition to contracting for his services--that is, if an outfitter is worried that his client will mistake a deer for an elk, he can insist that the client have a deer license before he takes that person into the field. That could obviously apply to resident clients as well as nonresident

clients.[15]

Appellees cite the large percentage increase in nonresident hunters during the period 1960-1970 (530% increase in nonresidents vis-a-vis 67% increase in residents) as a justification for Montana's discriminatory scheme. Putting aside the question of whether that statistic justifies discriminating against nonresidents, the actual numbers should be examined because the percentages are misleading. The most recent year for which statistics are available is 1974-1975. In that year, there were 31,406 nonresident hunters in Montana and 198,411 resident hunters (Def. Ex. A, Tr. p. 26,

---

[15]The statistics in Appellees' brief from 1973 (that 516 residents and 7,423 nonresidents employed outfitter services) are misleading because the nonresident big game hunter was required by Montana law at that time to employ an outfitter. That requirement was voided by the Montana Supreme Court in 1975 on equal protection grounds. State v Jack, 539 P 2d 726. Presently, only approximately 20% of nonresidents use outfitters. Residents also use outfitters but the percentage is smaller. (Tr., 248, 23.)

p. 6 of Exhibit). It can readily be seen from the actual numbers than nonresidents comprise only approximately 13% of the total number of hunters.

In this connection, a grievous statistical error made by the District Court was compounded by Appellees in their brief (Appellees' brief, p. 33). The Appellees argue that if license fee differentials were disallowed, Montana would have only two alternatives: (1) to impose virtually the same fee on nonresidents as on residents; or (2) to allocate licenses on the basis of population (Appellees' brief, p. 33).[16] The Court found that if the ... latter alternative were chosen, Montana residents would be entitled to only .34% of the elk licenses issued (A. 71).

---

[16]It is worth mentioning again that Appellants have never argued that the Constitution requires identical fees for residents and nonresidents. Reasonable additional fees may be assessed the nonresidents based on added enforcement costs and state-borne conservation expenditures supported by resident taxes. (Toomer v Witsell, supra.)

The Appellees' brief supports the same erroneous statistical analysis (Appellees' brief, p. 33). As noted above, nonresidents constitute approximately 13% of all hunters in Montana. While this percentage might increase if the license fee differential were less, it is entirely incorrect to conclude (based on some wholly inappropriate calculations related to all hunting licenses issued by all states of the union) that Montanans would be entitled to only .34% of the hunting licenses issued in Montana if licenses were allocated on the basis of applications.

Appellees stress the finding of the District Court that limitations of the annual kill may be accomplished in many ways but all of them involve in some degree a limitation upon hunter days (Appellees' brief, p. 32, A. 67). This finding is, in the first place, incorrect factually. For instance, limitation of the annual kill can (and is) accomplished through such device as specifying the age and sex of the species in question or restricting

geographical areas without limiting hunter days.[17] In any event, there are resident-neutral criteria upon which hunter days can be limited. (Aside from a lottery system mentioned by the Court.) For example, the hunting season can be shortened. Thus, the crude and invidious economic discrimination and combination license requirement aimed at nonresidents are not necessary to the accomplishment of sound game management.

Appellees argue that the license fee differentials do not involve rate-making principles (Appellees' brief, p. 28), and that different economic principles are involved. Both Toomer v Witsell, supra, and Mullaney v Anderson, supra, set forth the standard by which nonresident fish and game

---

17 The Montana Fish and Game Commission is empowered to restrict licenses sold "to a specific hunting area and may specify the species, age, and sex to be taken in order to ensure proper management and propogation of game animals..." 26.202.1(f), R.C.M.

license fees are to be judged. That standard indicates that nonresidents may be charged an additional fee resonably related to additional enforcement costs posed and/or reasonably related to tax contributions made by residents but not nonresidents to the resources. That is the principle upon which Appellenats' proof proceeded and the principle which applies to the present case. Appellees argue that some Montana landowners contribute (involuntarily) to the wildlife because wildlife feed on their lands. There is no necessary correlation between residency and landownership. For example, Plaintiff Donald Moris, Minnesota resident, is a landowner in Montana (Moris Deposition, p. 11) and suffers the same pctential for depradation--yet he is forced to pay the nonresident hunting fee.

Appellees also cite the "substantial level of General Fund expenditures by (Montana) agencies (which) directly or indirectly benefit wildlife." (Appellees' brief, p. 30.) The brief, however,

merely lists such agencies (Id.) without setting forth the amounts contributed and without systematically analyzing the contributions. These agency contributions were considered by Appellants' expert witnesses at the trial and their respective contributions were systematically analyzed (Tr. pp. 47-138, 399-441). The District Court unanimously found on the record that, with due regard to the presumption of constitutionality, the differential cannot be justified on any cost basis. The mere listing by Appellees of state agencies which make contributions to Montana's wildlife resources can hardly suffice to overcome this explicit finding by the District Court.

Finally, Appellants have argued that a declaration by this Court that Montana's big game license scheme is unconstitutional will drastically impact other states with similar statutes. It should first be noted that the big game combination license required in Montana for nonresidents but not for residents is unique to Montana. No other state

has this requirement or a substantial equivalent thereof.

Indeed, the International Association of Game, Fish and Conservation Commissioners filed an amicus brief in the District Court in support of the Montana Fish and Game Department. Explicit care was taken, however, to limit the amicus appearance only to the license fee differential issue. No support was given by that organization to Montana's combination license requirement for big game. (Page 2 of District Court brief of International Association of Game, Fish and Conservation Commissioners.)

Since no other states engage in this discriminatory combination license practice, it is obvious that a decision by this Court on that issue will have little impact on states other than Montana.

There would be more impact on other states resulting from a decision by the Court adverse to Montana on the license fee differential issue. The precise impact, however, is unclear.

Little reliance can be placed on the compilations by Appellees of state laws as set forth in the Appendix to Appellees' brief because the laws of other states are not directly comparable--largely because the combination license distorts the comparison. Most other states listed on Appellees' Appendix A appear not to have as severe a license fee differential as does Montana.

For these reasons, Appellants respectfully submit that their rights to equal protection of the laws have been violated. Given this violation, the relative impact on other states of a constitutional decision is largely irrelevant.

For the foregoing reasons, Appellants respectfully submit that the decision of the District Court should be reversed.

Respectfully submitted this 29th day of September, 1977.

GOETZ & MADDEN
P. O. Box 1322
Bozeman, Montana 59715

by _____
James H. Goetz
Attorney for Appellants

CERTIFICATE OF SERVICE

I, James H. Goetz, hereby certify that on this 29th day of September, 1977, I served true and correct copies of the foregoing brief upon Clayton R. Herron, Attorney at Law, by depositing same in a postage prepaid envelope, and mailing same and that I delivered true and correct copies to Northwest Orient Airlines to be flown to Washington, D.C. and delivered on tomorrow's date by messenger to Paul A. Lenzini, Chapman, Gadsby, Hannah & Duff, 1700 Pennsylvania Avenue, N.W., Washington, D.C. 20006

_____
James H. Goetz